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No. 85- ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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May 1986

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QUESTION PRESENTED[1]

Whether, in an award of just compensation to a landowner for the taking of an easement, an element of value may be ignored solely because that element of value reflects a separate, compatible use that is not the highest and best use of the land as a whole, or whether just compensation requires consideration of the value imparted by all compatible uses of the property.

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[1] The parties in the Court of Appeals were The Firestone Tire & Rubber Company, KWW Associates and the United States of America.

KWW Associates does not have any parent company, subsidiaries or affiliates. The Firestone Tire & Rubber Company does not have any parent company or affiliates. It has the following subsidiaries that are not wholly owned: Firestone East Africa Ltd., Firestone Hispania, S.A., Firestone Italia S.p.A., Firestone N.Z. Limited, Lone Star Transport Lines, Inc., Firestone Portuguesa, S.A.R.L., Hulera El Centenario, S.A., Industria Firestone de Costa Rica, S.A., Liberia Metal Processing Inc.

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71A(h) 3, 4

IN THE

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OCTOBER TERM, 1985

No. 85- ——

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Firestone Tire & Rubber Company and KWW Associates petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals accompanying the decision that is the subject of this petition is reported at 783 F.2d 1256 and is reproduced as Appendix A to the petition. Earlier reported opinions of the court of appeals, 680 F.2d 388 and 731 F.2d 1207, are reproduced as Appendices E and H, and earlier unreported opinions as Appendices F and L. The opinions of the district court are reported at 507 F. Supp. 589, 576 F. Supp.

685 and 595 F. Supp. 731 and appear as Appendices C, G and K.

JURISDICTION

The final judgment of the court of appeals (App. N, p. 108a, *infra*) was entered on March 3, 1986. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION

The Fifth Amendment to the Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation."

STATEMENT

This case presents an important question relating to the standard for valuing property taken for public use when the affected tract of land is reasonably adaptable to several different but compatible uses. The decision of the Fifth Circuit, which prohibits consideration of more than one use of a tract of land in a condemnation proceeding, is inconsistent with the principles of just compensation established by this Court and conflicts with decisions of several other circuits.

The Property Taken

In 1978, the Department of Energy filed declarations of taking of easements in Orange County, Texas, for laying multiple pipelines for the transportation of crude oil and other liquids in connection with the Department's Strategic Petroleum Reserve. The Government thereby took a permanent 50-foot easement for laying multiple pipelines and a temporary easement of 25 feet of workspace adjacent to the permanent pipeline right-of-way. The condemned easements lie across the three tracts of land involved in this case. Two of the tracts are owned by petitioner Firestone; the other is owned by petitioner KWW Associates.

The Government's easements, as the Fifth Circuit noted, adjoin the northern side of "an existing 'pipeline corridor,'" which follows a farm-to-market road across the three tracts of land owned by the petitioners. (P. 49a, *infra.*) At the time of the taking, twelve pipelines were already in place in that pipeline corridor (p. 29a, *infra*) pursuant to easements that the landowners had sold to petrochemical companies since 1956. A large but finite number of pipelines can be placed within the pipeline corridor that traverses the petitioners' tracts.

A petrochemical plant is located on a part of petitioner Firestone's land and "[m]any of the world's largest chemical plants" are located in the vicinity. (P. 49a, *infra.*) Most of the acreage of the three tracts owned by the petitioners is pasture, including the portions of land through which the existing pipeline corridor passes.

The Proceedings Below

The issue of just compensation for the Government's taking of the easements was initially tried to a three-person condemnation commission pursuant to Fed. R. Civ. P. 71A. Witnesses for the landowners at the compensation hearing determined that there was a distinct market for pipeline easements across the landowners' tracts inside the existing pipeline corridor. Easements for such pipeline rights-of-way are bought and sold regularly in that part of Southeastern Texas. Pipeline builders tend to parallel as nearly as possible the paths of existing pipelines in order to minimize costs. Accordingly, the landowners' witnesses determined the value of the Government's permanent pipeline easements by analyzing comparable sales of pipeline easements in reasonable proximity to the condemned sites. They identified 19 such comparable sales in their analyses and determined the value of the Government's taking based on those comparable sales. They also added an amount to cover rent for the temporary workspace easements that adjoined the permanent ones. (Pp. 19a-23a, *infra.*)

The Government's valuation witness ignored the presence of the existing pipeline corridor across the three tracts of land and the element of value that it added to the worth of the landowners' tracts. He found that the highest and best use of the petitioners' tracts as a whole was for industrial plant sites, and, accordingly, he placed a value per acre on that property based on recent sales of industrial land. Then he calculated the value of the condemned easements by taking 90 percent of that figure for each of the small number of acres actually subject to the permanent easements. He added an amount to cover a particular severance damage item and a further amount equivalent to rent for the temporary workspace easement. (P. 50a, *infra.*)

The commission's amended report accepted the landowners' evidence and their method of valuation. That report, recommending compensation for the landowners based on their evidence of comparable sales of nearby pipeline easements, was accepted by the district court,[1] with a modification not relevant here. (P. 41a, *infra.*) Judgment of $164,611 was entered for Firestone and $96,200 for KWW. (Pp. 42a-46a, *infra.*)

On appeal, the Fifth Circuit disagreed. While acknowledging that there was an "existing 'pipeline corridor'" across the petitioners' tracts of land, the Fifth Circuit held that it was error to consider evidence of comparable sales of pipeline rights-of-way in determining the amount of compensation that was due. It ruled that the "before-and-after" method of valuation, which awards a landowner the difference between the value of his land before a taking and the value of the remainder after the taking, was the only appropriate method of determining just compensation for a taking of an ease-

[1] The federal rules provide that the findings of a condemnation commission shall be accepted by the district court unless clearly erroneous. Fed. R. Civ. P. 71A(h), 53(e)(2).

ment or any other part of a larger tract. (P. 57a, *infra.*) It proceeded on the assumption that the Government's method of valuation was the before-and-after method even though the Government witness had *not* undertaken to value the entire tracts before and after the new pipeline easements were taken but only to take the "before" value per acre and reduce the value of the few acres covered by the easements by a judgment factor of 90 percent.

Moreover, the Fifth Circuit stated that the affected tracts of land must be treated as having only a single use. Most significantly, the Fifth Circuit ruled that, based on that principle, it was error to consider any value added to the land by its secondary use as a pipeline corridor when as a whole the land was best suited for use as industrial plant sites. It ordered the district court to disregard *all* of the landowners' evidence of comparable sales of pipeline rights-of-way on the sole ground that there was no evidence in the record that the *entire* parent tracts could be used as a pipeline corridor. (Pp. 58a-59a, *infra.*)

The Fifth Circuit remanded the case to the district court with instructions to determine the value of the pipeline easements by considering the value of the parent tracts as industrial land only and without considering the added value represented by the existing pipeline corridor.[2] It directed that the determination of value should be based on the Government's evidence, and that the landowners could not remedy their evidentiary showing, accepted by the commission and the district court but

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[2] The court of appeals would not permit consideration of the value of the pipeline corridor because the corridor had not been effectively severed from the parent tract. (Pp. 56a-57a, *infra.*) The severance test, however, is relevant when a landowner seeks severance damages for injury to separate and independent parcels of land caused by a taking, and it is not relevant to the issue presented here.

now ruled after the fact to be irrelevant because related to an erroneous legal theory. (P. 59a, *infra.*)

On remand, the district court, which saw that the Government witness's method of valuation was not the before-and-after method that the court of appeals prescribed (pp. 69a-70a, *infra*), found in the Government's evidence a set of sales of comparable tracts, one an industrial site not burdened with permanent easements and the other a nearby site similar in size but burdened with an easement. The district court used that set of sales to calculate before-and-after valuations of petitioners' tracts. (Pp. 71a-73a, *infra.*) This application of the before-and-after method again resulted in substantial compensation for the landowners.

On a second appeal by the Government, the Fifth Circuit ruled that it had intended the district court to accept the Government witness's actual valuation, not just his evidence and what it took to be his method. It therefore directed the entry of a judgment that it prescribed on the basis of the Government witness's calculations of value for industrial land, which totally ignored the land's additional use as a pipeline corridor. (P. 83a, *infra.*) It ordered the district court to award substantially lower compensation to the landowners for the taken easements —$20,178 to KWW and $31,436 to Firestone.

The district court complied. (P. 92a, *infra.*) However, persuaded that the judgment it had entered in compliance worked a great injustice, the court granted a new trial in the interest of justice. (P. 100a, *infra.*) The court of appeals, on the Government's petition, issued a writ of mandamus (p. 104, *infra*), and the district court in obedience to the writ vacated its new trial order and entered the judgment mandated by the court of appeals (p. 107a, *infra*). This final judgment of the district court was affirmed by the Fifth Circuit largely on the basis of its prior rulings and the law of the case doc-

trine but with some elaboration of its reasoning. (Pp. 1a-8a, *infra.*)

REASONS FOR GRANTING THE WRIT

The court of appeals has ruled that, in determining just compensation for the petitioner landowners for the multiple pipeline easements the Government has taken over their tracts, the condemnation tribunal may not take account of the special element of value imparted to the tracts by the existence of a pipeline corridor. That ruling, on an important issue of federal condemnation law, is inconsistent with the decisions of this Court in *United States* v. *Miller*, 317 U.S. 369, 375 (1943), and *Olson* v. *United States*, 292 U.S. 246, 255 (1934). The court's ruling also conflicts with decisions of other courts of appeals, which have followed this Court in holding—in the words of one of them—that where there are distinct but compatible uses of a single tract "[b]oth uses must be taken into account in the determination of the market value of the whole tract." *United States* v. *Winnebago Tribe of Nebraska*, 542 F.2d 1002, 1006 (8th Cir. 1976).

The Government itself acknowledged both the substantiality and the importance of the issue in its brief on the first appeal. It said: "This appeal presents substantial issues regarding the proper method for calculating just compensation when the government imposes a pipeline easement upon a piece of property." It added that the case was one of many pending pipeline condemnation cases involving the Government's Strategic Petroleum Reserve and that the court of appeals' decision would have a "substantial effect" on those cases in particular and on pipeline easement cases in general.

1. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. The standard for determining what consti-

tutes just compensation for property condemned by the Government is fair market value. *See United States* v. *Miller*, 317 U.S. 369, 374 (1943). When the condemned property is a part of a larger tract or is an easement or right-of-way or other partial estate that burdens the land, the courts typically have used one of two methods for computing the market value of the property taken. The first method is the so-called "before-and-after" method. The value of the entire tract of land before the partial taking is compared with the value of what is left after condemnation—the burdened tract or the smaller tract. *E.g., Transwestern Pipeline Co.* v. *O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969).

The second commonly used method values the easement or the land that is actually taken and then adds to that value any diminution in the value of the remainder that was caused by the taking, *i.e.*, severance damages. *See United States* v. *97.19 Acres of Land*, 582 F.2d 878, 880 (4th Cir. 1978). Properly applied, both methods should produce similar results in most situations. The just compensation requirement can be satisfied by either method. It is clearly satisfied when the landowner receives the money value of what is taken plus damages to the remainder resulting from severance. It can also be satisfied when a landowner receives the difference between the fair market value of his land before the taking of an easement and the fair market value of the land after an easement has been imposed. *See Dugan* v. *Rank*, 372 U.S. 609, 624-26 (1963); *United States* v. *Virginia Electric & Power Co.*, 365 U.S. 624, 632 (1961).

Under either of those two methods of valuing land in partial takings, and in cases of complete takings as well, the use to which the land is or can reasonably be put is a major factor in determining fair market value. Condemnation proceedings are virtually unanimous in computing the value of land affected by Government takings on the basis of "the highest and best use" of the land, which is the most profitable use to which the

land is likely to be put in the reasonably near future. That use will logically determine fair market value, *i.e.*, what a willing buyer would pay a willing seller based on their separate assessments of the stream of earnings the land will produce. *See Olson* v. *United States*, 292 U.S. 246, 255 (1934).

A single tract may have two different compatible uses, each contributing to its total value. So it is in the case of the tracts in this case, adaptable to the construction of petrochemical plants but also, without interference with the industrial use, adaptable to housing pipelines beneath the surface of the pipeline corridor that traverses them. Nothing in the doctrine of highest and best use requires that a court ignore the factual reality of separate compatible uses. To the contrary, to ignore it is to deprive the landowner of a part of the fair market value of his land. The Fifth Circuit denied reality when it held that, because industrial use and not pipeline easement use was the highest and best use of the land as a whole, the condemnation commission and the district court erred in considering the landowners' evidence of the value represented by the pipeline corridor passing through their tracts of land. The court's foreclosure of consideration of any added value from a separate and compatible use of a portion of the petitioners' tracts is flatly inconsistent with decisions of this Court defining what is just compensation under the Fifth Amendment.

The guiding principle of the just compensation requirement is that a landowner is entitled to be put in as good a position monetarily as he would have occupied if his property had not been taken. *See United States* v. *Miller*, 317 U.S. 369, 373 (1943). An owner receives that measure of just compensation only if all the considerations that would dictate what a willing buyer would pay and a willing seller would accept are taken into account. Just compensation includes "*all elements of value* that inhere in the property," *Olson* v. *United States*, 292 U.S. 246, 255 (1934) (emphasis added), and

it is to be "arrived at upon just consideration of all the uses for which [the property] is suitable," *id.*, or—otherwise stated—it "is to be fixed with due consideration of *all* [*the property's*] *available uses.*" *United States* v. *Miller*, *supra*, 317 U.S. at 375 (emphasis added). *See also Boom Co.* v. *Patterson*, 98 U.S. 403, 408 (1879). The Fifth Amendment thus demands recognition of all elements of value inherent in property that is condemned.

The Fifth Circuit's holding, that only a single use for the entire tract of land may be considered and that proof of added value from another compatible use of a portion of the tract must be excluded, defies that demand. It ignores a factor that would reasonably influence the price a willing seller and a willing buyer would set for the tracts or easements over them. Accordingly, it falls short of the standard of a market value equivalent for just compensation.

2. The Fifth Circuit's ruling that evidence of value deriving from a separate but compatible use of a portion of a tract of land may not be considered in condemnation proceedings when that use is not the highest and best use of the land as a whole also conflicts with decisions of several other courts of appeals. The Fourth, Eighth and Tenth Circuits, following this Court's statement of what the takings clause demands, have held that condemnation tribunals should consider all elements of value represented by separate uses of portions of the affected land when those uses are compatible with each other.

The Fourth Circuit addressed the issue in *Cade* v. *United States*, 213 F.2d 138 (4th Cir. 1954). A landowner in a partial takings case offered testimony concerning the added value of a small deposit of granite rock on a larger tract of land. The district court had excluded that testimony on the well-worn ground that "[i]n arriving at a fair market value it is not proper to show separate valuations of component parts." *Id.* at

141. The Fourth Circuit reversed, holding that the general rule that property should be valued as a whole "*does not* preclude the admission of testimony showing particular elements of value" of various portions of the land. *Id.* at 142 (emphasis added). *Accord United States* v. *97.19 Acres of Land*, 582 F.2d 878, 882-83 (4th Cir. 1978).

Similarly, in *United States* v. *1,955.00 Acres of Land*, 447 F.2d 673 (10th Cir. 1971), the Tenth Circuit reversed a district court's refusal to consider the value that a limestone rock quarry on a small portion of the affected land added to the value of a tract whose highest and best use as a whole was as a grain and livestock farm. The Tenth Circuit held that the landowners' proof of the value of the limestone quarry "*could not be entirely rejected* in reaching a fair award of just compensation." 447 F.2d at 676 (emphasis added). *See also United States* v. *179.26 Acres of Land*, 644 F.2d 367, 368-71 (10th Cir. 1981).

And, in another case similar to this one, the Eighth Circuit held that it was error for a district court to refuse to consider the added value from a distinct but compatible use of a portion of a tract of land in determining the value of the property as a whole. In *United States* v. *Winnebago Tribe of Nebraska*, 542 F.2d 1002 (8th Cir. 1976), the condemnation commission had found that a portion of the affected tract was reasonably adaptable to recreational use and the remainder was best suited for agricultural use. Citing precedents from the Fourth Circuit (and this Court's *Miller* opinion) as well as its own, the court of appeals held that "[b]oth uses *must be taken into account* in the determination of the market value of the whole tract" for purposes of the just compensation requirement of the Fifth Amendment. *Id.* at 1006 (emphasis added). It ruled that the condemnation commission had properly determined the value of the tract by recognizing the added value represented by the

part of the land that was adaptable to recreational use. *Id.*[3]

3. When the court of appeals said that the separate compatible use of the landowners' tracts as a pipeline corridor had to be ignored, it made more than an abstract error of law. In conjunction with that ruling, the court required compensation to be computed solely on the basis of the method of valuation used by the Government's expert witness. The method that the court thus mandated put into practice the doctrinal error committed by the court by ignoring altogether the element of value imparted by the pipeline corridor.[4]

That would not have been true had the method of valuation used by the Government's expert witness actually been the before-and-after method of valuing a partial

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[3] The Court of Appeals for the Third Circuit has affirmed a district court judgment insofar as it sustained a valuation based on separate and compatible uses. In United States v. 1,629.6 Acres of Land, 360 F. Supp. 147, 152-53 (D. Del. 1973), *aff'd in relevant part*, 503 F.2d 764, 766 (3d Cir. 1974), the district court refused to find error in the condemnation commission's determination that the highest and best use of a larger portion of a tract was farm and recreational land while a smaller portion was best adapted to a sand and gravel pit. Each portion within the tract had been separately valued. On appeal, the Third Circuit indicated that it was in full agreement with the district court's analysis and discussion of this issue.

[4] The court of appeals also held that the district court could *not* reopen the evidentiary record to give the landowners an opportunity to submit new evidence that would have conformed to the prescribed before-and-after method. (P. 59a, *infra*.) This ruling constituted an abuse of appellate discretion, if not a denial of due process. It squarely conflicts with the decision of at least one other circuit, which required a district court, in the interest of justice, to permit litigants to repair an evidentiary case held faulty as a matter of law after the record had been closed. See duPont v. United States, 385 F.2d 780, 784 (3d Cir. 1967) ("plaintiffs [should have] an opportunity to supply a vacuum created by the post-trial determination of the legal insufficiency in their evidence").

taking. As we have said, when properly applied that method should produce approximately the same result as would a specific valuation of the partial estate taken (assuming that the land is properly valued).

In fact, the valuation method used by the Government's expert witness, which the court of appeals approved and insisted upon, is not the before-and-after method. What the court of appeals unfortunately took for defiance on the part of the district court in its decision on the first remand [5] (p. 82a, *infra*) was a good-faith effort on the part of the district court to reconcile what the court of appeals had said was the rule that must be followed with its actual remand instructions.

The instructions were to proceed on the Government witness's evidence exclusively. But that evidence was not before-and-after evidence. (Pp. 69a-71a, *infra.*) Before-and-after valuation would entail comparison of what land-sale negotiations between one of the petitioner landowners and, say, a petrochemical manufacturer would yield *before* the Government had taken the multiple pipeline easement in issue and what such negotiations would yield *after* the taking.

The "before" price would reflect (1) the landowner's knowledge that he was giving up his pipeline corridor and the consequent ability to sell easements for pipelines from time to time, and (2) the purchaser's knowledge that he was acquiring the ability to sell such easements, which would be in addition to and would not interfere with his ability to build his petrochemical plant. The "after" price would reflect the knowledge of the bargainers on both sides that one of a finite number of

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[5] The Government had suggested the idea of defiance by filing a petition for mandamus asserting that the district court was threatening to exceed its mandate on the first remand by taking further evidence. The court of appeals denied the petition. (P. 62a, *infra.*) The district court professed not to rely on any new evidence (p. 68a, *infra*), and its appears that it did not in fact do so.

possible sales of easements in the corridor had been made —and made to a potential competitor in the pipeline-easement market since the Government's easements are for an unusually wide 50 feet, capable of accommodating several pipelines, and are assignable. The difference between the "before" price and the "after" price should closely approximate the value placed on pipeline easements in actual sales as shown in the landowners' evidence of 19 such sales.

The Government witness made no analysis that compared the prices of industrial sites whose owners retained the ability to sell something like a 50-foot multiple pipeline easement with the prices of otherwise comparable sites whose owners had already realized on that ability and thereby expended it. All that the Government witness did was to analyze indiscriminately—without regard to whether tracts housed pipelines or were capable of doing so—sales of land for industrial purposes in the vicinity. He derived from his analysis a per-acre value of $3,500. Then he multiplied $3,500 times the few acres actually within the Government pipeline easement and applied to the product a judgmental diminution factor. That calculation determined the valuation he placed on the easements. True, the witness went through the mathematical exercise of (1) multiplying the acreage of the tracts by his per-acre value and calling the product a "before-taking" value of the tracts, (2) deducting from that product the calculated diminution in the value of the easement acreage and calling the result the "after-taking" value, and (3) finally deducting the "after" value so calculated from the "before" value. The end result of this pointless exercise is necessarily equal to the result of the original application of the witness's 90-percent judgment factor to $3,500 times the number of acres in the easement. (Pp. 50a, 69a, *infra.*)

The district court on the first remand saw this and sought to make a true before-and-after valuation by look-

ing at two sales of comparable tracts of land that it found in the Government expert's study, one tract believed by the court to be burdened by an easement and the other not. (Pp. 71a-73a, *infra.*) The court's effort was a brave one, but the expert's study was simply not conducive to a true before-and-after valuation. Indeed, the landowners' study of precisely comparable sales of pipeline easements came much closer to serving the legitimate aims of a before-and-after method of valuation than the Government expert's study. But the court of appeals insisted, contrary to decisions of this Court and its sister courts of appeals, that the value that those sales indicated had to be ignored. Its decision is important to condemnation law and should be reviewed.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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May 1986

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 85-2536

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

8.41 ACRES OF LAND, ETC., *et al.*,
Defendants,

KWW ASSOCIATES, *et al.*, and the
FIRESTONE TIRE AND RUBBER CO.,
Defendants-Appellants.

March 3, 1986

Appeal from the United States District Court
for the Eastern District of Texas

Before RUBIN, JOHNSON and JONES, Circuit Judges.

PER CURIAM:

KWW Associates ("KWW") and Firestone Tire & Rubber Company ("Firestone") appeal from the district

court's entry of judgment in this land condemnation action which was brought by the United States in order to obtain pipeline easements for part of the United States' Strategic Petroleum Reserve facilities. This is the third appeal in this protracted litigation and the fifth time that this case has been before this Court. On appeal, KWW and Firestone challenge the methodology for calculation of the compensation award due it which was mandated by this Court in the first two appeals of this case. In addition, KWW and Firestone challenge this Court's decision in the initial appeal to foreclose further evidentiary development on remand of the case. Because the prior decisions of this Court are law of the case, the judgment of the district court, which is in exact accordance with this Court's prior opinions, is affirmed.

I. BACKGROUND

As the fifth panel of this Court to address the present litigation, only a brief summary of the pertinent facts is necessary. This case arose in March of 1978 when the United States sought to condemn pipeline easements across three parcels of land for the purpose of constructing multiple pipelines as part of the Government's Strategic Petroleum Reserve facilities. Two of those parcels were owned by Firestone, and the third parcel was owned by KWW. Previously existing pipeline easements crossed all three parcels of land.

The procedural history of this case is fairly complex, however. A condemnation commission was appointed pursuant to Fed. R. Civ. P. 71A, and the commission recommended substantial compensation for the landowners pursuant to the legal theory presented by KWW and Firestone. The district court accepted that determination with one modification. *United States v. 5.00 Acres of Land*, 507 F. Supp. 589 (E.D. Tex. 1981).

That decision was reversed by this Court and the case remanded. *United States v. 8.41 Acres of Land*, 680 F.2d 388 (5th Cir. 1982). KWW and Firestone had asserted to both the commission and the district court that the condemned tracts of land were constructively severed from each of the three parent tracts. Labeling this theory as "unorthodox", 680 F.2d at 391, this Court held that the district court and commission were clearly erroneous in finding that the strips of condemned land were severed from their parent tracts. 680 F.2d at 394. Moreover, this Court noted that, in the Fifth Circuit, the exclusive method of valuation in a partial-taking case is the difference between the value of the parent tract before the taking and its value after the taking. 680 F.2d at 392 & n.5. That method was explicitly applied by this Court to the valuation of pipeline easements in *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969), many years prior to the instant litigation. This Court further held that the Government's characterization of the use and value of the condemned acreage was "appropriate and proper" and that the Government's calculations were "uncontested." 680 F.2d at 395.

Finally, this Court held:

> In an exercise of the power of eminent domain, *due process requires that the owners be given an opportunity to be heard on the issue of compensation. The landowners had an opportunity to prove the market value of the tracts was higher than established by the Government, but failed to meet this burden; they only presented evidence of comparable sales of pipeline right-of-way. Accordingly, it is unnecessary to conduct additional hearings on determining the fair market value of the parcels.* The cause is thus remanded to the district court for determination of the fair market value, *with instructions to rely upon the evidentiary record as it*

> *presently exists.* In calculating the fair market value, the district court shall consider the highest and best use of the tracts as industrial plant sites and shall base an award of compensation for both permanent and temporary easements upon the evidence of comparable sales submitted by the Government.

680 F.2d at 395 (emphasis added, citations omitted, footnote omitted). This Court denied en banc rehearing of the panel decision. 685 F.2d 1385 and 1386 (5th Cir. 1982).

What should have been the end of this case, however, turned out to be only the beginning. Contrary to this Court's mandate, the district court held additional hearings. This case appeared before this Court for a second time when the Government petitioned for a writ of mandamus to prevent those additional evidentiary bearings. A second panel of this Court denied the petition, although it reiterated the mandate of this Court that the evidentiary record was closed. The district court then entered findings of fact and conclusions of law awarding the condemnees substantially more compensation than it had awarded initially. *United States v. 8.41 Acres of Land*, 576 F. Supp. 685 (E.D. Tex. 1983).

Yet a third panel of this Court reversed and ordered the district court to award judgment in accordance with this Court's specific calculations. *United States v. 5.00 Acres of Land*, 731 F.2d 1207, 1209-10 (5th Cir. 1984) (per curiam). The district court complied with this Court's mandate, albeit with considerable reluctance. *United States v. 8.41 Acres of Land*, 592 F. Supp. 829, 831-32 (E.D. Tex. 1984). Subsequently, however, the district court granted KWW's and Firestone's motion for a new trial on the ground that the interests of justice so required. *United States v. 8.41 Acres of Land*, 595 F. Supp. 731, 735 (E.D. Tex. 1984). The Govern-

ment petitioned this Court for a writ of mandamus which was granted. A fourth panel of this Court granted the petition in an unpublished opinion, holding that "a new trial would serve no purpose other than that of circumventing the mandate issued by a prior panel of this court." *In re United States*, 759 F.2d 20 slip op. at 3 (5th Cir. 1985) (per curiam) 759 F.2d 201 (unpublished). The district court complied, vacating its order for a new trial and entering final judgment in the amounts specified by this Court in the second appeal. KWW and Firestone now appeal for the third time.

II. DISCUSSION

On appeal, KWW and Firestone contend that the compensation ordered by this Court is not just compensation within the requirements of the Fifth Amendment because it fails to account for the element of value represented by the existence of a pipeline corridor or alley across the servient tracts of land. In addition, the landowners contend that they are deprived of property without due process of law because this Court, in the first appeal, declined to allow reopening of the evidentiary record to provide KWW and Firestone with an opportunity to challenge the correctness of the Government's calculations.

As the fifth panel of this Court to review this case, this panel is well aware of the troublesome history this litigation presents. Contrary to KWW and Firestone's contentions, both issues presented to this panel were addressed and resolved in the two prior appeals in this case. Because KWW and Firestone now appeal from a judgment of the district court which was entered in strict accordance with the second opinion of this Court, there is nothing presented for review in this case. Consequently, the judgment of the district court is affirmed.

The doctrine of the law of the case forecloses a different result than that which was obtained in the earlier

two appeals. A decision of a legal issue by an appellate court establishes the law of the case which must be followed in all subsequent proceedings in the same case, whether those proceedings take place at the trial court or in the appellate court, unless one of the three following exceptions is met: "(1) a subsequent trial produces substantially different evidence, (2) controlling authority has since made a contrary decision of law applicable to such issue, or (3) the prior decision was clearly erroneous and would work manifest injustice." *EEOC v. International Longshoremen's Association*, 623 F.2d 1054, 1058 (5th Cir. 1980), *cert. denied*, 451 U.S. 917, 101 S.Ct. 1997, 68 L.Ed.2d 310 (1981). *See, e.g., Chapman v. National Aeronautics and Space Administration*, 736 F.2d 238, 241 (5th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 517, 83 L.Ed.2d 406 (1984); *United States v. 162.20 Acres of Land*, 733 F.2d 377, 379 (5th Cir. 1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 906, 83 L.Ed.2d 920 (1985). The doctrine does not reach questions which were not decided in a former proceeding, but it does cover those issues decided by necessary implication as well as those decided explicitly. *International Longshoremen's Association*, 623 F.2d at 1058. *Chapman*, 736 F.2d at 241.

The purpose behind this rule bears repeating in the context of this protracted litigation:

> The "law of the case" rule is based on the salutary and sound public policy that litigation should come to an end. It is predicated on the premise that "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions or speculate of chances from changes in its members," and that it would be impossible for an appellate court "to perform its duties satisfactorily and efficiently" and expeditiously "if a question, once considered and

> decided by it were to be litigated anew in the same case upon any and every subsequent appeal" thereof.

White v. Murtha, 377 F.2d 428, 431 (5th Cir. 1967) (citations and footnotes omitted).

KWW and Firestone assert that one of the issues presented in this appeal is before the Court for the first time and that its consideration is not barred by the law of the case. Contrary to these contentions this Court specifically determined that KWW's and Firestone's due process rights did not require further development of the evidentiary record on remand. 680 F.2d at 395.

KWW and Firestone further assert that one of the exceptions to the doctrine of the law of the case applies in the instant case, that is that the prior decision by this Court was clearly erroneous and would work manifest injustice. As the fifth panel of this Court to address this case, this panel disagrees.[1] Moreover, it is the firm

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[1] In support of its contention that the original panel's decision to close the record was clearly erroneous and worked manifest injustice, KWW and Firestone cite this Court to the following cases: *Colonial Leasing, Inc. v. Logistics Control International*, 770 F.2d 479 (5th Cir. 1985) (on rehearing); and *duPont v. United States*, 385 F.2d 780 (3rd Cir. 1967). Neither case is persuasive as each presents a case markedly different from the instant case. In the *duPont* case, the Third Circuit held that the evidentiary record must be reopened because the appellants could not have anticipated that the district court would rule that their valuation evidence was incompetent. In the present case, however, it had long been established that the exclusive method in the Fifth Circuit for valuation of partial takings was the before-and-after methodology. Thus, KWW and Firestone should have plainly anticipated the requirement to put on evidence comporting with that theory. Moreover, KWW and Firestone elected not to challenge the Government's figures, instead relying solely on their "unorthodox" methodology. That was a tactical decision, which this Court is not required to allow the parties to rectify at this late date. On this record, there is no injustice. The *Colonial Leasing* case involved a panel rehearing of its own prior decision. That case is markedly different from the present case in which KWW and Firestone ask a fifth panel of this

rule in this Circuit that one panel cannot disregard the precedent set by a prior panel even if the second panel perceives error in the precedent. *United States v. 162.20 Acres of Land*, 733 F.2d at 379.

III. CONCLUSION

For the foregoing reasons, the judgment of the district court is

AFFIRMED.

Court to declare that the initial panel's decision was clearly erroneous. The burden upon appellants in this case to show manifest injustice is substantially greater than the burden on the petitioners in *Colonial Leasing*. That burden has not been met here.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-78-170-CA-1547-3,

Tract Nos. 314E-3 and 314E-4

UNITED STATES OF AMERICA,
Plaintiff,

vs.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants.

Civil Action No. B-78-176-CA-1547-3,

Tract Nos. 338E-1 and 338E-2

UNITED STATES OF AMERICA,
Plaintiff,

vs.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants.

Civil Action No. B-78-169-CA-1547-3,

Tract Nos. 313E-1 and 313E-2

UNITED STATES OF AMERICA,
Plaintiff,
vs.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND KWW ASSOCIATES, *et al.*,
Defendants.

[Filed October 24, 1980]

AMENDED REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION

The Commission, after consideration, does here adopt this Report in place and instead of that report previously issued in this matter.

AUTHORITY OF COMMISSION:

(1) Federal Rule of Civil Procedure 71A, as Amended, and

(2) Order of Court Appointing Commission, entered October 10, 1979 and March 11, 1980, and

(3) General Instructions of the Court and Amending Order of January 23, 1980.

DATE OF HEARING:

May 21 and May 22, 1980.

COUNSEL FOR GOVERNMENT:

Harry W. McKee, United States Assistant Attorney, United States Department of Justice, Eastern District of Texas, Beaumont, Texas 77704.

Thomas T. Carolan, Trial Attorney for the United States, Attorney General's Office, Washington, D.C.

WITNESSES FOR GOVERNMENT:

Jack Aulbaugh, Expert Real Estate Appraiser, Beaumont, Texas.

Matt M. Racki, Civil Engineer, licensed Surveyor, Beaumont, Texas.

DEFENDANT LANDOWNERS:

The Firestone Tire and Rubber Company
KWW Associates

COUNSEL FOR LANDOWNERS:

Brown & Hines, Attorneys at Law, here represented by George W. Brown, Jr. and Earl S. Hines, Beaumont, Texas.

WITNESSES FOR LANDOWNERS:

N. A. Adamson, Firestone Tire and Rubber Company, Orange, Texas.

William R. Casserly, Jr., Right-of-Way and Claims Division, Conoco, Inc., Houston, Texas.

Jack M. Aylesworth, Right-of-Way Agent, Stokes & Watson, Houston, Texas.

James R. Mestepey, Firestone Synthetic Rubber & Latex Company, Orange, Texas.

Richard Negley, Milam Building, San Antonio, Texas.

William C. Cook, Jr., Expert Appraiser, Beaumont, Texas.

Willard Hall, Expert Appraiser, Beaumont, Texas.

William E. Bauer, Pipeline Agent, Houston, Texas.

STIPULATIONS:

(1) Date of Taking: March 7, 1978.

(2) Plaintiff has the authority to take this property.

(3) This Commission has the authority to hear this matter.

(4) The estate acquired: a perpetual assignable easement for multiple pipelines and some temporary work easements for a period of three years commencing March 7, 1978.

(5) The total taking: 6.90 acres from Firestone as a permanent easement; 4.73 from Firestone as a temporary work easement; 5.3 acres from KWW as a permanent easement and 3.11 acres from KWW as a temporary work easement.

(6) The comparables to be used on direct testimony have been exchanged.

RECORD OF PROCEEDINGS:

A competent reporter was present throughout the hearing and a transcript can be obtained. All exhibits have been filed with the U.S. District Clerk.

FINDINGS OF THE COMMISSION

JUST COMPENSATION TO BE AWARDED:

A total award of $164,611.27 to Defendant, The Firestone Tire and Rubber Company and $96,200.00 to Defendant, KWW Associates.

HIGHEST AND BEST USE:

The highest and best use for the property taken is the use to be made by the Plaintiff of said property, being for pipeline right-of-way and easement.

APPROACH TO EVALUATION CONSIDERED MOST APPLICABLE:

Market data approach.

SALES CONSIDERED MOST COMPARABLE FOR ESTABLISHING MARKET VALUE:

(1)	GRANTOR:	KWW Associates, A Texas partnership
	GRANTEE:	Shell Pipeline Company
	DATE:	3/30/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 511, Page 798, Records, Orange County, Texas
(2)	GRANTOR:	KWW Associates, a Texas Partnership
	GRANTEE:	Continental Oil Company
	DATE:	17/23/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 513, Page 141, Records, Orange County, Texas
(3)	GRANTOR:	The Firestone Tire and Rubber Company
	GRANTEE:	Shell Pipeline Company
	DATE:	1/25/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 515, Page 265, Records, Orange County, Texas
(4)	GRANTOR:	The Firestone Tire & Rubber Company
	GRANTEE:	Continental Oil Company
	DATE:	5/8/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 513, Page 889, Records, Orange County, Texas
(5)	GRANTOR:	E. I. DuPont de Nemours & Company
	GRANTEE:	Continental Oil Company
	DATE:	6/16/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 514, Page 155, Records, Orange County, Texas

(6)	GRANTOR:	Nelda C. Stark
	GRANTEE:	Continental Oil Company
	DATE:	1/18/79
	INSTRUMENT:	Easement
	RECORDED:	Vol. 509, Page 276, Records, Orange County, Texas
(7)	GRANTOR:	KWW Associates
	GRANTEE:	Continental Oil Company
	DATE:	4/30/79
	INSTRUMENT:	Easement
	RECORDED:	Volume 513, Page 141, Records, Orange County, Texas
(8)	GRANTOR:	Nelda C. Stark
	GRANTEE:	Continental Oil Company
	DATE:	1/18/79
	INSTRUMENT:	Easement
	RECORDED:	Volume 509, Page 276, Records, Orange County, Texas

DESCRIPTION OF THE LOCATION, TOPOGRAPHY AND ACCESSIBILITY OF SUBJECT TRACTS:

The subject tracts are located in Orange County, Texas, in an area that is highly industrialized. It is in the neighborhood of the so-called Chemical Row in an area where many of the world's largest chemical plants are functioning. Access to this area is by Highway 87 connecting the city of Orange with the city of Bridge City. Farm Road 1006, being an asphalt road, extends from Highway 87 eastward to Orange. The property here under consideration is located at the intersection of Highway 87 and Farm Road 1006. According to the testimony presented to us, the terrain in this area is generally level, apparently fairly well drained, has utilities and is in the immediate vicinity of numerous pipelines. There was no discrepancy in the testimony of the various witnesses as to the location of the property, the ter-

rain, or the uses of lands in this particular area. The condemnation here under discussion does not turn on topography, location or accessibility as would a condemnation for a wooded or river front tract to be used for park purposes. This is a condemnation of an easement and a temporary work area.

FINGINGS AND FACTORS CONSIDERED IN MAKING THIS AWARD:

The Commission, after careful consideration of the evidence heard and after considering the weight to be given to the testimony of the witnesses, concludes that the preponderance of the evidence supports the following findings:

(1) That the highest and best use of the property here condemmed is for pipeline easement and/or right-of-way purposes.

(2) That the comparable sales presented by the Government did not speak to this highest and best use.

The Commission was faced with the problem of a piece of property, admittedly attached to and adjacent to a larger tract of property owned by the same land owner, however, having been severed by uses inconsistent with the use of the balance of the property. The particular tracts under consideration have been effectively severed from the main body of the ownership by previous easements and grants given to others. These easments caused an alienation of the use of the particular tracts here condemned. They are in this particular alley being used for pipelines. As proof of this there are a number of lines in there at present, which is reflected in the comparable sales above listed. The Commission has taken into consideration that the usual way of appraising property is to take the parent tract's valuation and

subtract therefrom the value of the part left in the land owner, thus giving credit for enhancement or devaluation of surrounding property still in the hands of the land owner. It is felt in this particular situation that this method of appraisal is inappropriate in that by the granting of easements which are perpetual in nature, the land owner has previously severed these tracts from the parent tract leaving a remainder that must stand on its own feet. Therefore, this Commission has rejected the comparable sales of the Government as placing an evaluation on this property that is inconsistent with the prices being paid for like and similar properties in the area and inconsistent with the highest and best use of this property. The Commission cannot believe that the sales by the same Defendants here involved to other purchasers of property to be used for the same purposes the Government desires will be excluded purely because they do not reflect what such a purchaser is ready, willing and able to pay in this particular neighborhood. In other words, the Commission feels that the highest and best use is for pipeline purposes; therefore, the only way to determine the fair market value of this property for pipeline purposes would be to find what pipeline rights-of-way are selling for in the immediate area. Could there by any better comparable than the sale of the property adjoining this said desired Government right-of-way? The Commission feels that the comparable submitted by the Government are totally inadequate as they are based upon the wrong theory of highest and best use.

Next, we must take up the point of the exclusion of the sales of right-of-way as the purchaser is under "economic coercion" to purchase. Rights-of-way involved in adjoining sales were presented. Some with the threat of condemnation, and some without. The

therat of condemnation is a double-edged sword: the party desiring the condemnation can always hold it over the land owner's head that the property will be taken through the courts or a voluntary agreement must be reached. Certainly, there is an element of cost involved by the condemnor in a condemnation proceeding. It must be realized there is a cost involved to the condemnee. The condemnor can spread his cost of acquisition over the entire length of his pipeline, whereas the condemnee must bear all of the cost of his particular problem. To disallow, as the Government contends, all sales among parties where the right of condemnation existed, would be to disallow, in the case of a pipeline right-of-way, any and all cogent evidence. The Commission feels that the best evidence of what a pipeline right-of-way will sell for is what pipeline right-of-ways have sold for in the area under similar circumstances. For a condemnor to take a piece of property to be used perpetually as a multiple pipeline right-of-way which may be assigned to those who do not have the right of condemnation, in an area devoted entirely to pipeline rights-of-way and to call the property mere industrial property, does not stand to reason. The condemnee has no choice in this matter as the property was taken. In this immediate case a larger right-of-way than is normally granted was taken by the Government. In theory, on a fifty foot right-of-way, a hundred six-inch pipelines could be placed side by side. Or, pipelines could be placed at varying depths. Under any circumstance the land owner has lost, for practical purposes, the total and entire use of this property. His only hope or desire is that some day this property will be released back to the land owner. Many pipeline right-of-ways extend back to the earlier days of oil production shortly after the turn of the century. The taking of a pipeline right-of-way is certainly a perpetual grant and by

the very nature of the product that flows through said lines renders the surface totally inadequate for any industrial use. The Government contends this is industrial property and therefore the Commission must agree that if it is industrial property, its use by the land owner is certainly terminated. In the United States of America vs. 320 acres of land, more or less, 605 F2d 762, Chief Judge John R. Brown states that "Thus, the only standard of compensation mandated by the Constitution is that it be 'just', which in turn 'evokes ideas of fairness and equity.' " Further, he states that market value is what it fairly may be believed that a purchaser in a fair market condition would have given. In other words, had a right-of-way agent approached the Defendants and asked for a right-of-way across this property, what would Firestone et al have requested. In this opinion the highest and most profitable use for which the property is adaptable and needed or likely to be neded in the reasonably near future is taken into consideration in determining fair market value.

Thus the Commission feels that the Government's contention that the proper method of evaluation is the appraisal of the entire parent tract and then of the remainder thus leaving the value of the taken part is not accepted by the Commission as it is felt that for all practical purposes there was a severance by previous conveyance and the tract here under consideration is a separate, distinct, free-standing pipeline corridor. Further, the Government has contended that the sales of the pipeline right-of-ways where there was the threat of condemnation was not a fair and equitable method of determining the value of the property here taken, would leave the evaluation here to total speculation. Certainly, a pipeline right-of-way is a unique use of property. It does not enhance the property, it does not enhance the surrounding property as the pipeline may not serve the

surrounding property. The property lying between pipelines certainly would have a highest and best use as pipeline property, for it has little if any other use possible. There would be no way to value a pipeline right-of-way on a piece of property that is dedicated to such and is used as such, for otherwise you would be certainly attempting to equate unequals. We are seeking just and fair compensation to the landowner and just and fair payment by the condemnor. Whether property is taken under the threat of condemnation or not, the Commission feels that the evidence of what is paid for like property, in the like neighborhood, in the immediate time frame, must be considered with the "threat of condemnation" held in mind.

In the Plaintiff's Motion for Costs and Attorney Fees, the Commission is without authority to hear this matter and therefore overrules the Motion for purposes of this Report.

DISCUSSION OF COMPARABLES:

The sale from KWW Associates to Shell Pipeline in March of 1979 is thirty feet in width and a little over 4,300 feet in length. The consideration paid here was approximately $150.00 per linear rod or if put to an acreage basis would be $13,200.00. The second sale is adjacent to the one above and is between KWW Associates and Continental Oil Company in January of 1979. This is a twenty foot right-of-way to lay two six-inch lines. The price here would be also $150.00 a rod. The Firestone to Shell right-of-way in January of 1979 was $150.00 a rod for a twenty foot wide right-of-way. This would be some $19,000.00 per acre.

The Firestone to Continental right-of-way was for a twenty foot easement with two lines and was some mile long at about $19,000.00 per acre. The DuPont

to Continental Oil sale in May of 1979 was for a twenty foot easement a little over a mile long and came to some $22,000.00 per acre or $165.00 a rod.

The sale in January 1979 between Nelda C. Stark and Continental is just east of the above Firestone tract and off of the Farm to Market Road. This is a ten foot easement approximately a half a mile long with the right to lay two lines. This sold for $52,800.00 per acre.

The sale from KWW Associates to Continental was on adjoining land to the subject and therefore must be taken into consideration.

And the Stark to Continental sale was on similar land to that here under consideration.

The appraiser adjusted these sales prices for reasonable rent on the work easement etc. and came up with a range from $68,000.00 to $85,000.00 per acre. This conclusion was the temporary easement was worth some $11,196.00 or in this particular case a rental of that amount and that the permanent easement was worth $85,000.00 or a total of $96,200.00 for the KWW Associates property.

The taking by the Government here is for a multi-pipeline right of way that is perpetual and assignable. In the sale from KWW to Continental on April 30, 1979, the actual sale consisted of approximately two acres for $150.00 a rod being nearly $20,000.00 per acre. This was for two six-inch lines on a ten foot wide permanent easement with a forty foot temporary. The sale from Firestone to Continental dated May 8, 1979, was granted without the power of eminent domain. It was for approximately 2.39 acres; with a consideration of $47,000.00 or $19,800.00 an acre for a twenty foot easement and a forty foot temporary easement. Two lines could be laid simultaneously. They are to be six inch lines.

The sale from Nelda Stark to Continental Oil Company on January 18, 1979, was for approximately .67 acres with a payment of $200.00 a rod of $52,800.00 per acre. It is a ten foot permanent easement with two six-inch lines to be laid. The temporary easement was as reasonable and necessary. The DuPont to Continental sale of May 1979 was for .068 acres. It was for the width of the pipeline only and that was a six inch line. This actually computes out to be $876,000.00 per acre (according to the transcript of this case). The KWW Associates to Shell dated March 30, 1979, was for three acres and comes to some $13,000.00 per acre for a thirty foot work easement all for one twelve inch pipeline.

The Firestone to Shell sale on January 25, 1979 was for $19,800.00 per acre. This was a twenty foot easement to contain one twelve-inch pipeline.

In doing the evaluation the appraisers repeatedly brought out the fact that the Government's pipeline easement is fifty feet wide and that the pipeline easement could contain any and all lines that the Government might want to put in there or any assignee might wish to put in there.

As the Commission feels that the Government's comparables were all for industrial property, it is here felt that there is no need to discuss these as the determination above of the highest and best use of this property is in total contradiction of the Government's contention.

Mr. Cook testified that the total value of the permanent easement taken from KWW Associates was $85,000.00 and the temporary easement $11,200.00. Mr. Hall has testified that the permanent easement taken from Firestone was $132,751.00 and that the temporary easement taken was $31,860.27. A dis-

tinction is made between the appraised value of the easement taken from KWW and Firestone in that different appraisers were used and therefore the award would be different due to particular circumstances affecting that property and differences in expert opinion.

Mr. Cook in his appraisal states that he did not add any value whatsoever to the easement value for the assignable multi-pipeline rights, but merely considered it as if it were one individual sale. Mr. Hall assigned no value to this right.

The Commission is not comfortable with this as if the Government had come in and asked for a specific right to lay one or more pipelines, a certain value would have been placed, and had they come again and asked for that right on more acreage, another value would have been placed. Therefore, it is felt that the value of the easement based on the comparables would be a value based on the right of the taking pipeline to lay the specified number of pipelines and not an indeterminable number; however, the Commission has no testimony before it that it can accept and the Commission can only hear evidence and cannot appraise on its own.

CONCLUSION

The Commission heard testimony from the expert witness as to the value of this taking and reaches the following conclusions:

(1) All of the expert witnesses testifying were highly qualified.

(2) The highest and best use of this particular piece of property is for pipeline uses.

(3) That the taking is a multiple pipeline perpetual assignable easement.

(4) That the preceeding paragraph should be taken in consideration in determining the fair market value of the property here condemned.

(5) The Commission feels bound to follow either the recommendation of Mr. Cook or Mr. Hall and should not appraise the property themselves.

As Mr. Cook and Mr. Hall did not add on to the taking the multiplicity of pipelines etc. discussed above, the Commission is faced with the obligation to accept Mr. Cook's and Mr. Hall's appraisal in full without addition for the multiplicity matter, unless the Commission feels that his appraisal was completely and totally out of line.

IT IS THE OPINION of this Commission that the highest and best use of this land is for pipeline right-of-way/easement. Therefore, the Commission awards $132,751.00 to the Defendant, the Firestone Tire and Rubber Company, herein for the permanent taking of the right-of-way and $31,860.27 for the use of the work area; and $85,000.00 to the Defendant, KWW Associates, for the permanent taking of the right-of-way and $11,200.00 for the use of the work area.

The Commission feels bound to accept the appraisal of the appraiser on the specific tract or tracts of land he appraised. Further, there is no precedent for the Commission to give any certain value to the multiplicity of pipeline matter as no evidence was presented and the Commission cannot appraise.

The exhibits presented in this matter are in the custody of the U.S. District Clerk.

As directed by the general instructions of this Court, this Amended Report and Findings of the Commission are submitted to the Court. Copies are to be

furnished to the Counsel of Record and the former owners.

Respectfully submitted,

/s/ Jack B. Osborne
JACK B. OSBORNE
Chairman

/s/ W. Smythe Shepherd
W. SMYTHE SHEPHERD

/s/ Bryan D. Beck, Jr.
BRYAN D. BECK, JR.

APPENDIX C

UNITED STATES DISTRICT COURT
E. D. TEXAS
BEAUMONT DIVISION

Civ. A. Nos. B-78-170-CA-1547-3,
B-78-176-CA-1547-3 and B-78-169-CA-1547-3

UNITED STATES OF AMERICA

v.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the Firestone Tire & Rubber Company et al.

UNITED STATES OF AMERICA

v.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the Firestone Tire & Rubber Company et al.

UNITED STATES OF AMERICA

v.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and KWW Associates et al.

Jan. 29, 1981

MEMORANDUM OPINION AND ORDER

JOE J. FISHER, District Judge.

This is an eminent domain case. Presently before the Court are the Amended Report and Findings of the Condemnation Commission (Report) appointed to determine the issue of just compensation in this cause, the objections to the Report filed by the parties, and two motions filed by the Defendants. As will appear more clearly below, the Court will approve the Report, as amended, with one modification. The Motion of the Defendants to Award Costs of Suit will be denied and their Motion to Award Interest will be granted.

On March 7, 1978, the United States of America as Plaintiff filed a complaint and declaration of taking and obtained an order of immediate possession and a judgment vesting title pursuant to the Declaration of Taking Act, 40 U.S.C. § 258a *et seq.* That same day the Plaintiff deposited into the Registry of the Court the sums of thirty-thousand, eight hundred eighty-eight dollars ($30,888.00) as the amount of estimated just compensation for the taking of tracts nos. 313E-1 and E-2, eight thousand, one hundred ninety-five dollars ($8,195.00) for tracts nos. 314E-3 and E-4, and ten thousand, seven hundred sixty-nine dollars ($10,769.00) for tracts nos. 338E-1 and E-2.

These tracts are located in a highly industrialized portion of Orange County, Texas. The estate acquired by the Plaintiff was a perpetual, assignable fifty-foot easement for multiple pipelines and a twenty-five-foot temporary work easement for a period of three years, beginning on the date of the taking. The authority for the taking was recited to be the Declaration of Taking Act, 40 U.S.C. § 258a *et seq.*, the general authorization statute, 40 U.S.C. § 257, and the Energy Policy and Conservation Act, 42 U.S.C. § 6201, *et seq.*, as modified by the Department of Energy Organization Act, 42 U.S.C.

§ 7101 *et seq.* Funds for the acquisition of these lands were appropriated by the Acts of Congress approved June 1, 1976, Pub. L. No. 94-303, and July 31, 1976, Pub. L. No. 94-373. The tracts were taken for the purpose of establishing the Strategic Petroleum Reserve and related facilities, specifically, for the construction of multiple oil pipelines.

The issue of just compensation for the taking was referred to a condemnation commission (Commission) appointed pursuant to Rule 71A of the Federal Rules of Civil Procedure[1] and these three actions were consolidated for trial. In ruling on the objections of the parties to the Report of the Commission, the Court is to apply the clearly erroneous standard governing the reports of special masters. Rules 71A(h), 53(e)(2). *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 689, 66 S.Ct. 1187, 1193, 90 L.Ed. 1515 (1946); *Livas v. Teledyne Movible Offshore, Inc.*, 607 F.2d 118, 119 (5th Cir. 1979). This is the same standard governing review by a court of appeals of findings of fact by a district court. *NLRB v. Sequoia District Council of Carpenters*, 568 F.2d 628, 631 (9th Cir. 1977); *Oil, Chemical and Atomic Workers International Union v. NLRB*, 547 F.2d 575, 580 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 966, 97 S.Ct. 2923, 53 L.Ed.2d 1062 (1977). Thus, the findings of the Commission "come here well armed with the buckler and shield" of the clearly erroneous rule. *Horton v. United States Steel Corp.*, 286 F.2d 710, 713 (5th Cir. 1961). This standard has been described as follows:

> The findings of the master come with a strong presumption of validity but they are not given the effect of a verdict of a jury. The parties are entitled to a real review by the court to determine whether the findings were clearly erroneous. A finding by

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[1]All references are to the Federal Rules of Civil Procedure, unless indicated otherwise.

> the master is clearly erroneous when, although there is evidence to support it, the court on the entire evidence is left with the definite and firm conviction that a mistake has been made. * * * A finding may be set aside even though it is supported by substantial evidence if the court is convinced that it is clearly wrong. At the same time a finding must stand, even though the court thinks it is against the preponderance of the evidence, if the court does not consider it clearly erroneous.

9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2614 at 810-11 (1971) (footnotes omitted). Under this standard, the Court will proceed to rule on the objections of the parties.

The Plaintiff's Objections:

A.

The subject property is a fifty-foot wide strip of land located immediately adjacent to an existing pipeline corridor. The Commission found that the highest and best use of the property was the use to be made of it by the Plaintiff, *i.e.*, pipeline right-of-way and easement. The Plaintiff has objected to this finding, and asserts that it is clearly erroneous. This objection need not detain us for long.

By highest and best use is meant either some existing use on the date of taking, or one which the evidence shows was so reasonably likely in the near future that the availability of the property for that use would have affected its market price on the date of taking and would have been taken into account by a purchaser under fair market conditions. *Olson v. United States*, 292 U.S. 246, 255, 54 S.Ct. 704, 708, 78 L.Ed. 1236 (1934); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979). Normally, because of economic pressures, the existing use of the subject property represents its

highest and best use. *United States v. Buhler*, 305 F.2d 319, 328 (5th Cir. 1962). Here, the subject tracts abut on an existing pipeline corridor.[2] The evidence shows that the property was used for pipeline purposes as early as 1956, transcript at 113, and that at the time of the taking there were twelve pipelines already in place in the corridor. Transcript at 243. The Commission's finding as to highest and best use is not merely not clearly erroneous; it is eminently correct. The Plaintiff's objection will be overruled.

B.

The Plaintiff has also objected to the method used by the Commission in valuing the subject tracts, urging that the failure to use the before and after method was clear error. The before and after method is normally employed where the condemnor takes only a portion of a larger tract.

> Stated generally, the correct measure of value in a case involving condemnation of part of a tract is the fair market value of the entire tract immediately before the taking less the fair market value of the remainder immediately afterwards.

United States v. Trout, 386 F.2d 216, 219 (5th Cir. 1967). *See United States v. 101.88 Acres of Land*, 616 F.2d 762, 768-69 (5th Cir. 1980). The choice of method of valuation is a legal conclusion and, if wrong, is not

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[2] A pipeline corridor was defined for the Commission as:

> a long narrow strip of land, having utility [for] various communications and transportation purposes between two or more points [where its] service or functions are feasible and where they are needed. According[ly] properties can be used for many purposes[:] shortline railroads, highways, drainage ditches, chemical gas pipelines. However, these uses are not just limited to that, but they are normally a straight stretch of land.

Transcript at 199.

entitled to the shield of the clearly erroneous rule. *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 526, 81 S.Ct. 294, 297, 5 L.Ed.2d 268 (1961); *Spray-Bilt, Inc. v. Ingersoll-Rand World Trade, Ltd.*, 350 F.2d 99, 103 (5th Cir. 1965). However, it must be remembered that the before and after method is appropriate only where part of a larger tract is taken.

The Commission found that such was not the case here. Its finding was that

> [t]he Commission was faced with the problem of a piece of property, admittedly attached to and adjacent to a larger tract of property owned by the same landowner, however, having been severed by uses inconsistent with the use of the balance of the property. The particular tracts under consideration have been effectively severed from the main body of the ownership by previous easements and grants given to others. These easements caused an alienation of the use of the particular tracts here condemned. They are in this particular alley being used for pipelines. * * * The Commission has taken into consideration that the usual way of apprising property is to take the parent tract's valuation and subtract therefrom the value of the part left in the land owner, thus giving credit for enhancement or devaluation of surrounding property still in the hands of the land owner. It is felt in this particular situation that this method of appraisal is inappropriate in that by the granting of easements which are perpetual in nature, the land owner has previously severed these tracts from the parent tract leaving a remainder that must stand on its own feet.

Report at 6. The Report continues:

> Thus the Commission feels that the Government's contention that the proper method of evaluation is the appraisal of the entire parent tract and then of

> the remainder thus leaving the value of the taken part is not accepted by the Commission as it is felt that for all practical purposes there was a severance by previous conveyance and the tract here under consideration is a separate, distinct, freestanding pipeline corridor.

Id. at 9-10. The party attacking a finding of the Commission has the burden of demonstrating that such finding is clearly erroneous. *In re Multiponics, Inc.*, 622 F.2d 709, 723 (5th Cir. 1980); *Goodman v. Highlands Insurance Co.*, 607 F.2d 665, 667 (5th Cir. 1979). The Plaintiff has failed to carry its burden of persuasion. Its objection speaks only to the Commission's method of valuation, while the true issue is the finding that the subject tracts were not taken from larger tracts but were severed by previous conveyances and at the time of the taking were a separate and distinct pipeline corridor. The Plaintiff's objection does not address this issue. Nonetheless, upon a careful review of the entire record, the Court cannot say that such finding was clearly erroneous. *Cf. Baetjer v. United States*, 143 F.2d 391, 395 (1st Cir.), *cert. denied*, 323 U.S. 722, 65 S.Ct. 131, 89 L.Ed. 618 (1944). The objection will be overruled.

C.

The Plaintiff has further objected to the use by the Commission of sales of pipeline easements to oil and pipeline companies. It contends that these sales were not properly comparable sales, as they did not reflect the true market value of the subject property.

The constitutional mandate of just compensation[3] means that the landowner is entitled to be paid for the fair market value of the land taken at the time of the taking. *United States v. Fuller*, 409 U.S. 488, 490, 93

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[3] U.S.Const. Amend. V.

S.Ct. 801, 803, 35 L.Ed.2d 16 (1973); *United States v. Miller*, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943); *United States v. 320.0 Acres of Land*, 605 F.2d 762, 781 (5th Cir. 1979). Fair market value for the condemned property "is what a willing buyer would pay in cash to a willing seller." *Miller*, 317 U.S. at 374, 63 S.Ct. at 280. In determining fair market value,

> consideration is to be given to all the facts and circumstances that would reasonably go into the making of a bargain of purchase and sale between a willing buyer under no obligation to buy and a willing seller under no obligation to sell. Market value is not, of course, a quality which inheres in the property itself, but is rather a reflection of that state of mind of the public with respect to the property. That state of mind may be established by the testimony of expert witnesses who are qualified by their special knowledge, investigations and study to give an opinion as to what they believe it to be, or by evidence of transactions reasonably close in time involving other comparable property from which the market value of the property in question may be directly deduced by the fact finder himself. Evidence of such comparable transactions may also be received from expert witnesses in support of their opinions as to the value of the property involved in the litigation.

United States v. Smith, 355 F.2d 807, 809 (5th Cir. 1966) (citations omitted). The best evidence of market value is usually prior sales of the same property, reasonably close in time to the taking and not forced. *Surfside of Brevard, Inc. v. United States*, 414 F.2d 915, 917 & n. 3 (5th Cir. 1969).

In the present case, the Plaintiff condemned a fifty-foot wide strip of land across the Defendants' property in order to lay multiple pipelines. As there were several

pipelines already in place at the time of the taking immediately adjacent to the subject tracts, there were comparable sales of the same property in evidence. All the comparable sales used by the Commission were of recent vintage, the oldest being consummated on January 18, 1979. Report at 4.[4] Some of these sales were made to pipeline companies with the power of eminent domain, while others were not. The Plaintiff's comparables were all of industrial property and not of pipeline easements. As the Commission had previously determined that the highest and best use of the subject property was for pipeline easements, the comparables submitted by the Plaintiff were not considered.

The Plaintiff urges that none of the comparables used by the Commission were competent evidence, since considerations other than fair market value figured into the sale prices. There is support for the Plantiff's contention in the case of *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15 (5th Cir. 1969), which held that sales to buyers with the power of eminent domain were not to be considered in determining fair market value. This is so because

> [a] company condemning land might be willing to pay more than it is worth, and the owner of the land might be willing to take less than it is worth to avoid a lawsuit. Since a landowner would prefer to reach an agreement rather than be subjected to a lawsuit by a condemnor, a sale to a company possessing the power of eminent domain is more likely to show a compromise value than the true market

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[4] Since the property is to be valued as of the date of the taking, *United States v. Miller*, 317 U.S. 369, 374, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943), here, March 7, 1978, the valuation experts applied a discount factor to these sales to allow for the time differential between the date of taking and the dates of the comparable sales. Transcript at 133.

> value of the land. It would also be to the benefit of the company to avoid a time-consuming and asset-wasting lawsuit and thus the condemnor, too, is likely to compromise and perhaps pay more than the market value.

Id. at 18.[5] The Plaintiff would have the Court rule, with *O'Brien*, that all sales to buyers with the power of eminent domain were not to be considered by the Commission.

In addition, the Plaintiff urges that the comparable sales to Continental Oil Company, which did not have the power of eminent domain, transcript at 63, should also be excluded because Continental was acting under economic duress. The Commission considered in its Report two comparable sales to Shell Pipeline Company, which had the power of eminent domain, transcript at 9, and six sales to Continental. Report at 4. In so doing, the Commission considered that the power of eminent domain and economic duress would be factors that go to the weight of the evidence and not to its admissibility. *Id.* at 10.

To disallow all sales to pipeline companies as the Plaintiff urges would be to disallow *all* evidence of comparables sales. Transcript at 194; Report at 10. The Commission's duty, imposed by the fifth amendment, was to award just compensation for the property taken. The Commission could not discharge that duty by relying on pure speculation. *Olson v. United States*, 292 U.S. 246, 257, 54 S.Ct. 704, 709, 78 L.Ed. 1236 (1934). There

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[5] There is an exception to this exclusionary rule, not relevant here, where the evidence shows that "the fact that parties were condemnor and condemnee either was now known or had no influence because the sale was not in connection with, or in anticipation of, condemnation proceedings." *O'Brien*, 418 F.2d at 19 (quoting *Slattery Co. v. United States*, 231 F.2d 37, 41 (5th Cir. 1956)).

must be *some* evidence in the record for the Commission to base its award upon. The Court feels that the Commission admirably dealt with this quandary by considering the comparable sales objected to by the Plaintiff, while keeping the substance of its objection in mind. This is the preferred procedure outlined by the fifth circuit in the recent case of *United States v. 320.0 Acres of Land*, 605 F.2d 762 (5th Cir. 1979). In that case, Chief Judge Brown, addressing a virtually identical issue, reasoned as follows:

> The fairness of an evidentiary exclusion may be entirely different, however, if the exclusion would eliminate all or nearly all of the "most comparable" sales. For then the parties would be forced to resort to sets of "less comparable" sales (sales much further removed in time or distance, or sales of properties with markedly different characteristics), and the very factors that diminish the comparability of these sales vis-a-vis the excluded sales may significantly favor one party and disadvantage the other. Nor would the exclusion necessarily expedite the trial proceedings in these circumstances, for it is likely that more time and effort would be devoted to litigating whether and what sort of adjustments must be made to reflect the greater dissimilarities between the condemned property and the "less comparable" sales.
>
> Thus, where an evidentiary exclusion would eliminate the "most comparable" sales available, the better course would be to admit the possibly tainted sales with appropriate instructions, permit the parties to present testimony pro and con regarding whether the sales are tainted and how much the taint distorts true market value, and then instruct the factfinder as to what elements of value must be included or excluded from the compensation award.

Id. at 801-02 (footnotes omitted). Having read the transcript of the hearing before the Commission, the Court is satisfied that it was sufficiently apprised of the problems associated with the "tainted" comparable sales by counsel and feels that no purpose would be served by remanding the case to the Commission with appropriate instructions. There was no error. The Plaintiff's objections are overruled.

Alternatively, the Court holds that the Plaintiff has demonstrated no harm resulting to it from the Commission's consideration of comparable sales to buyers with the power of eminent domain. The evidence at the hearing shows that possession of the power of eminent domain tends to lower the price of the property. Transcript at 173-74. If any damage resulted from the consideration of such sales, it was to the Defendants, who have not complained to the Court. Therefore, the Court finds that any error here was harmless as to the Plaintiff and did not affect its substantial rights. Rule 61.

D.

The Plaintiff's fourth objection goes to the Commission's failure to follow the valuation testimony given by its expert, Mr. Aulbaugh. Again, this objection need not occupy the Court for long. Mr. Aulbaugh's valuation was based entirely on his opinion that the highest and best use of the subject property was for industrial use. As his testimony did not touch upon the value of a pipeline easement, the Commission did not err in declining to follow his valuation. The Plaintiff's objection is overruled.

E.

The final objection of the Plaintiff goes to the failure of the Commission to find that there was no diminution in value to the oil, gas, and other mineral interests beneath the subject tracts by virtue of the taking. The

only evidence adduced at the hearing on this was to the effect that there would be no such diminution in value. Transcript at 407. The failure to include this finding in the Report was in all likelihood a mere oversight. The Report will be modified to provide that there was no diminution in value to the oil, gas, and other mineral interests beneath the subject tracts. Rules 71A(h), 53 (e) (2); *United States v. Tampa Bay Garden Apartments, Inc.*, 294 F.2d 598, 603 (5th Cir. 1961).

The Defendants' Objection:

The Defendants have objected to the Report on the ground that the Commission failed to value the exact estate taken in that the Report does not make any award for the multiple and assignable aspects of the taking. The Commission felt unable to place a value on the right to lay *multiple* pipelines and to *assign* the right to lay pipelines to third parties because there was no evidence in the record upon which it could rely in placing a value on such rights. Report at 14, 16.

Mr. Cook, an expert appraiser upon whose testimony the Commission largely based their award, testified that he was unable to place a value on the right to install multiple pipelines and to assign, as there were no comparables in the market. In this connection, the Chairman of the Commission asked the following question of Mr. Cook:

> CHAIRMAN OSBORNE: We'll start on an assumption here. Would you consider that if more than one pipeline could be laid, would you multiply by that factor? That's the question I'll permit.
>
> A. Mr. Osborne, there are a number of factors that one has to speculate on to arrive at an answer to that question. I, in my study of the data, I found no other situations where anyone else acquired that right, and consequently I'm a real estate appraiser

> and without data to support a statement. I would hesitate to make one. That is certainly a method of measuring it. The reasonability of that method does not take into consideration the speculative factors which are how many lines they can lay; we don't know that; they can lay as many as nine; they can lay as few as one, and to answer that I think it's very speculative.

Transcript at 166-67. Mr. Hall, another expert appraiser, was likewise unable to place a value on these rights, although he did state that "this is an additional burden on this easement; there is no question about that." Transcript at 283. Mr. Cook was also of the opinion that these rights were worth something, but he could not testify as to any specific value. Transcript at 168.

In order to make an award for these rights, the Commission, and the Court would be forced to resort to speculation as to how many lines the Plaintiff could lay in the fifty-foot easement and as to the value of the obscure right to assign the right to lay lines to others.[6] The Supreme Court has written that

> [e]lements affecting value that depend upon events or combinations of occurrences which, while within the realm of possibility, are not fairly shown to be reasonably probable, should be excluded from consideration, for that would be to allow mere speculation and conjecture to become a guide for the ascertainment of value—a thing to be condemned in business transactions as well as in judicial ascertainment of truth.

Olson v. United States, 292 U.S. 246, 257, 54 S.Ct. 704, 709, 78 L.Ed. 1236 (1934); *United States v. Trout*, 386

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[6] The Court has noted that several of the comparable sales considered by the Commission involved the right to lay two or more lines at once. *See, e.g.*, transcript at 128, 129, 132, 216, and 224.

F.2d 216, 223 (5th Cir. 1967); *United States v. Buhler*, 305 F.2d 319, 326-27 (5th Cir. 1962). The Court agrees with the Commission that any award for these rights would necessarily be based at this time upon pure speculation and declines to modify the Report in this respect.

However, the obligation to award just compensation for the exact estate taken cannot be totally ignored. The Court's reluctance to award compensation for these elements of the taking should not be construed to foreclose the right of the Defendants to receive just compensation for their taking when an award can be based in actuality, not on conjecture. Therefore, the Court feels that the better course is to sever these aspects from the remainder of the taking and allow the Defendants, if and when the Plaintiff decides to lay additional lines or assign that right to others, to return to the Court for additional compensation.

Motion for Award of Costs of Suit:

The Defendants have moved the Court for an award of costs, including attorney's fees, appraisal fees, expert witness fees, and costs of court. They claim such expenses as a part of the just compensation for the taking of their property. However, it is settled law that "[a]ttorneys' fees and expenses are not embraced within just compensation for land taken by eminent domain." *Dohany v. Rogers*, 281 U.S. 362, 368, 50 S.Ct. 299, 302, 74 L.Ed. 904 (1930). The recent case of *United States v. Bodcaw Co.*, 440 U.S. 202, 99 S.Ct. 1066, 59 L.Ed.2d 257 (1979), effectively forecloses discussion of this issue, ruling as it does that neither attorneys' fees, appraisal expenses, nor other costs are recoverable under the fifth amendment. The Motion will be denied.

Motion for Award of Interest:

The fifth amendment requires the payment of interest as an element of just compensation where the date of taking of the property precedes the payment of the

award. *United States v. Miller*, 317 U.S. 369, 381, 63 S.Ct. 276, 283, 87 L.Ed. 336 (1943); *Seaboard Air Line Ry. Co. v. United States*, 261 U.S. 299, 306, 43 S.Ct. 354, 356, 67 L.Ed. 664 (1923); *United States v. 59.29 Acres of Land*, 495 F.Supp. 212, 214 (E.D.Tex.1980). Just compensation is "the full equivalent of the value of [the property] at the time of the taking paid contemporaneously with the taking." *Phelps v. United States*, 274 U.S. 341, 344, 47 S.Ct. 611, 612, 71 L.Ed. 1083 (1927); *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123, 44 S.Ct. 471, 474, 68 L.Ed. 934 (1924). In order to achieve this full equivalent, the Declaration of Taking Act specifically provides that the judgment on a declaration of taking

> shall include, as part of the just compensation awarded, interest at the rate of 6 per centum per annum on the amount finally awarded as the value of the property as of the date of taking, from said date to the date of payment; but interest shall not be allowed on so much thereof as shall have been paid into the court.

40 U.S.C. § 258a.

It has been held that the six percent rate provided for in the Declaration of Taking Act is a constitutional minimum and "cannot be viewed as a ceiling on the rate of interest allowable in computing just compensation with respect to a deficiency." *United States v. Blankinship*, 543 F.2d 1272, 1276 (9th Cir. 1976). *Accord, Miller v. United States*, 620 F.2d 812, 837-39 (Ct.Cl.1980). This case presents one of the situations mentioned in *Blankinship* where a rate of no greater than six percent on the deficiency would contravene the fifth amendment. 543 F.2d at 1276. The factors that lead the Court to this conclusion are the great disparity between the amount of estimated compensation deposited into the

Registry of the Court by the Plaintiff [7] and the significant delay between such deposit and the date of the judgment. *Cf. Brown v. United States*, 263 U.S. 78, 86, 44 S.Ct. 92, 95, 68 L.Ed. 171 (1923); *United States v. Sargent*, 162 F. 81, 84 (8th Cir. 1908), *appeal dismissed*, 215 U.S. 618, 30 S.Ct. 410, 54 L.Ed. 351 (1910); *United States v. 59.29 Acres of Land*, 495 F.Supp. 212, 215-16 (E.D.Tex.1980). Therefore, the Court will award interest on the deficiency at the per annum interest rate applicable to three-year Treasury bonds [8] purchased on the date of taking, for the period from and including March 7, 1978, to the date of payment of the award. The task of calculating the exact amount of the judgment will be left to counsel, who will also submit an appropriate judgment. It is, therefore,

ORDERED, ADJUDGED and DECREED that the Amended Report and Findings of the Condemnation Commission, except as modified in this Memorandum Opinion, is in all things approved, ratified, and adopted. It is further,

ORDERED, ADJUDGED and DECREED that the Motion of the Defendants to Award Costs of Suit is denied, and their Motion to Award Interest is granted.

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[7] The Plaintiff deposited a total of $18,964.00 for the use of Defendant-Firestone. The Commission awarded Firestone $164,611.27. Similarly, the deposit for the use of Defendant-KWW was $30,888.00, while the Commission's award was $96,200.00

[8] This datum appears in the *Treasury Bulletin* and the *Federal Reserve Bulletin*, both of which should be readily accessible to counsel.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-78-170-CA-1547-3,

Tract Nos. 314E-3 and 314E-4

UNITED STATES OF AMERICA,
Plaintiff

vs.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants.

Civil Action No. B-78-176-CA-1547-3,

Tract Nos. 338E-1 and 338E-2

UNITED STATES OF AMERICA,
Plaintiff

vs.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants.

Civil Action No. B-78-169-CA-1547-3,

Tract Nos. 313E-1 and 313E-2

UNITED STATES OF AMERICA,
Plaintiff

vs.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and KWW ASSOCIATES, *et al.*,
Defendants.

[Filed February 12, 1981]

JUDGMENT ON THE AMENDED REPORT AND FINDINGS OF THE CONDEMNATION COMMISSION

ON THE 21st and 22nd days of May, 1980, came on for hearing before a Commission appointed by the Court the issue of just compensation for the condemnation of the estates taken by the Plaintiff from the Defendants in and to the above listed tracts, as said estates and tracts are described in the Complaints in Condemnation and Declarations of Taking filed in these causes on March 7, 1978. The Court, being fully advised in the premises, finds that the Complaints were duly filed, and that all proper process and notice required by law were given the owners named as Defendants therein.

The Amended Report and Findings of the Condemnation Commission (Report) awarding just compensation was filed on October 24, 1980. After considering the Re-

port, it appears to the Court that it should be approved, except as hereafter modified, and accordingly, it is ORDERED, ADJUDGED AND DECREED by the Court that the Report of the Commission be and it is hereby ACCEPTED AND APPROVED, except that the Report is hereby modified to provide that there was no diminution in value to the oil, gas, and other mineral interests beneath the subject tracts by virtue of the taking.

It is further ORDERED, ADJUDGED AND DECREED by the Court as follows:

(a) For the reasons set forth in the Memorandum Opinion and Order entered herein on January 28, 1981, the Court severs from the remainder of the taking the issue as to the just compensation owing to the Defendants for the right to lay additional lines, and to assign that right to third parties, and hereby allows the Defendants, if and when the Plaintiff decides to lay additional lines, or assigns that right to others, to return to the Court for additional compensation. The cases are retained on the Court's docket for that limited purpose only.

(b) The just compensation owing to the Defendant, The Firestone Tire & Rubber Company, for the condemnation of the estates taken by the Plaintiff in and to Tracts Nos. 314E-3, 314E-4, 338E-1, and 338E-2, as said estates and tracts are described in the Complaints in Condemnation and Declarations of Taking, except for the right to lay additional lines, or assign that right to others, is $164,611.27, together with interest on $145,647.27 of that amount at the rate of 7.69 per cent per annum from the 7th day of March, 1978, until the said sum of $145,647.27, together with interest, is deposited into the Registry of the Court.

(c) Plaintiff shall deposit into the Registry of the Court the said sum of $145,647.27, together with interest as set out in sub-paragraph (b), above, and, upon receipt of an Application for Distribution of Funds executed by The Firestone Tire & Rubber Company, the Clerk shall disburse the entire amount so deposited as follows:

The Firestone Tire & Rubber Company
c/o George W. Brown, Jr., Esquire
St. Thomas More House
395 Tenth Street
Beaumont, Texas 77702

(d) The just compensation owing to the Defendant, KWW Associates, for the condemnation of the estates taken by the Plaintiff in and to Tracts Nos. 313E-1 and 313E-2, as said estates and tracts are described in the Complaint in Condemnation and Declaration of Taking, except for the right to lay additional lines, or assign that right to others, is $96,200.00, together with interest on $65,312.00 of that amount at the rate of 7.69 per cent per annum from the 7th day of March, 1978, until the said sum of $65,312.00, together with interest, is deposited into the Registry of the Court.

(e) Plaintiff shall deposit into the Registry of the Court the sum of $65,312.00, together with interest as set out in sub-paragraph (d), above, and upon receipt of an Application for Distribution of Funds executed by KWW Associates, the Clerk shall disburse the entire amount so deposited as follows:

KWW Associates
c/o George W. Brown, Jr., Esquire
St. Thomas More House
395 Tenth Street
Beaumont, Texas 77702

SIGNED AND ENTERED this the 12th day of February, 1981.

/s/ Joe J. Fisher
JOE J. FISHER
United States District Judge

Approved as to form only:

/s/ [Illegible]
Assistant United States Attorney
Attorney for the Plaintiff

Approved as to form and content:

/s/ George W. Brown, Jr.
Attorney for the Defendants

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 81-2136

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

8.41 ACRES OF LAND, MORE OF LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and KWW ASSOCIATES, *et al.* and UNKNOWN OWNERS,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

5.00 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

6.90 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and FIRESTONE TIRE AND RUBBER COMPANY, *et al.* and UNKNOWN OWNERS,
Defendants-Appellees.

July 14, 1982

Rehearing and Rehearing En Banc
Denied Aug. 30, 1982

Appeal from the United States District Court
for the Eastern District of Texas

Before DYER *, JOHNSON and WILLIAMS, Circuit Judges.

JOHNSON, Circuit Judge:

The Government is appealing the compensation award in this condemnation case involving pipeline easements for the Strategic Petroleum Reserve. The district court appointed a condemnation commission, which determined an award for easements on two tracts owned by Firestone Tire & Rubber Company (Firestone) and one tract owned by KWW Associates (KWW). The district court consolidated the actions for trial, affirmed the Commission's award, and entered judgment of $164,611 for Firestone and $96,200 for KWW. *United States v. 5.00 Acres of Land, etc.*, 507 F.Supp. 589 (E.D.Tex.1981).

I. *Background*

After the 1974 Arab oil embargo, Congress authorized creation of the Strategic Petroleum Reserve (Reserve) for the storage of up to one billion barrels of petroleum as protection against energy supply interruptions. As amended in 1978, 42 U.S.C. § 6201 *et seq.* allows acquisitions of land for this project. Acquisition of multiple pipeline easements was necessary in order to carry petroleum, brine, and fresh water running to and from the Reserve's saltdome storage caverns.

On March 8, 1978, the Department of Energy (DOE) filed a declaration of taking for one such multiple pipe-

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* Circuit Judge of the Eleventh Circuit, sitting by designation.

line easement on three adjacent tracts of land in Orange County, Texas. The easements adjoined the north side of an existing "pipeline corridor" which followed an east-west farm-to-market road. The road, the pipeline corridor, and the new easements all bisected a 700-acre tract owned by KWW and an 1100-acre parcel of two tracts owned by Firestone. The entire KWW tract and the Firestone tracts north of the road were used as pasture, and a factory stood on the Firestone tracts south of the road. Many of the world's largest chemical plants were located in the same area. The interest acquired by the DOE was a perpetual, assignable, fifty-foot easement for multiple pipelines and a twenty-five foot temporary work easement for a period of three years. The total taking was 6.90 acres from Firestone as a permanent easement, 4.73 acres from Firestone as a temporary working easement, 5.3 acres from KWW as a permanent easement, and 3.11 acres from KWW as a temporary work easement. Shortly after a declaration of taking, the DOE placed a single 42-inch pipeline within the fifty-foot easement.

The district court appointed a three-person condemnation commission (Commission) to make a finding on just compensation for easements on these adjacent tracts. The normal procedure in awarding compensation for an easement is to determine the highest and best use of the entire acreage within the property lines of the parent tract and then calculate the difference between the market value of that tract before and after the taking. Indeed, the district court carefully instructed the Commission to use such a "before-and-after" valuation as a measure of compensation where a segment of a larger tract is taken.[1] Consistent with this approach, Jack Aul-

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[1] The district court's general instructions to the Condemnation Commission recite, in pertinent part:

> In these cases where only a portion of a larger tract of land belonging to the same landowner is taken, you must first deter-

baugh, the Government's valuation witness, testified that the highest and best use of the KWW and Firestone tracts was for industrial plant sites. Using five comparable sales of industrial property in the area, Aulbaugh valued the tracts at the time of the taking at $3500 per acre, and calculated the before-and-after value of the tracts on this basis. Aulbaugh found the value of the permanent easements to be $16,695 and $21,700 for KWW's and Firestone's property, respectively.[2]

The landowners' valuation witnesses, however, presented the Commission with an unorthodox theory of easement valuation which provided a dramatically higher compensation award. William Cook for KWW and Willard Hall for Firestone asserted that the Commission should treat the fifty-foot strip of condemned land as a separate entity from the remaining acreage within the

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mine the fair cash market value, immediately before the taking, of the entire tract of land of which the portion taken was a part, in the light of the highest and best use at the time of the entire tract as a single unit. You must next determine the fair cash market value, immediately after the taking, of the remainder of the tract not taken, bearing in mind that the highest and best use of the remainder after the taking may not be the same as the highest and best use of the entire tract before the taking. The difference between these two figures is the just compensation to which the landowner is entitled, both for that part of his property which has been taken and for the diminution in value, if any, of the remainder of his property. This takes care of any "severance damages" or any "enhancement in value," if any, and you are not to make any separate award of these or consider them further.

[2] For a before-taking value, Aulbaugh multiplied $3500 times the number of acres in each tract. For an after-taking value, he calculated that the area covered by the permanent easement would be reduced 90% from its fee value. Additionally, he allowed $3500 of severance damages to the Firestone parcel. For the temporary easements, he multiplied a rental factor of 32% times the acreage of the 25-foot strips times the $3500 per acre value. This yielded temporary easement damages of $3483 for KWW and $5200 for Firestone.

property lines of each tract. On this basis, they determined the highest and best use of the condemned strip of land to be for pipeline right-of-way. Using comparable sales of pipeline easements in the area, they valued the condemned strips at approximately $16,000 to $19,000 per acre, and treated the Government's permanent easement as a total taking. Cook valued the permanent easement at $85,000 on KWW property—Hall, at $132,751 on Firestone's property.

Cook and Hall had never used this procedure for valuing pipeline easements before, and failed to define the exact boundaries of the "potential" pipeline corridor which they claimed existed on the Firestone and KWW tracts.[3] Nevertheless, the Commission accepted the landowners' method of appraisal, finding that the particular strips of land subject to the easements had been effectively "severed" from the larger parcels. The Commission determined the highest and best use of the condemned property was for pipeline right-of-way, not industrial plant sites. The Commission accepted the landowners' estimates of damages and awarded $164,611.27 to Firestone and $96,200.00 to KWW for both permanent and temporary easements.

Applying the clearly erroneous standard, the district court affirmed the Commission's findings that (1) the condemned tracts had been severed from the large parent

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[3] Upon cross-examination, Hall defined the corridor as follows:

> Yes, sir, it's defined as being—I thought I described it as being adjacent to the north line of 1006 and extending to a northward direction some—I estimated about 66 acres altogether, there's about 39 acres in it now, but I estimated the corridor at the present time would be about 66 acres which would allow for additional lines over, say, the next 20 or 25 years . . . . I wouldn't consider it speculative because you have 15 lines put in there in the past 20 years, and I would think if 15 lines could go in in the previous 20 years and you have a growing chemical complex there, you could surely have 15 lines going in in the next 20 years.

tracts at the time of the taking and constituted a separate and distinct pipeline corridor; (2) the highest and best use of the property was as a pipeline right-of-way and easement; and (3) the landowners would have a right to return to the court for additional compensation if additional lines were laid in the easement, in order to avoid forcing the Commission to speculate on how many lines the Government would lay in the easement. The district court also approved the Commissioner's compensation awards. The Government appeals all three findings.

II. *Method of Valuation*

The district court adopted the Commission's finding that the fifty-foot condemned tract was constructively "severed" from the remaining part of each of the three parent tracts. Accordingly, the district court rejected the before-and-after method of valuing each parent tract as a basis for awarding compensation. The Government asserts that the district court erred in finding this method of valuation inappropriate.

Federal courts have long held that an appropriate measure of damages in a partial-taking case is the difference between the value of the parent tract before the taking and its value after the taking.[4] *United States v. Virginia Electric Co.*, 365 U.S. 624, 632, 81 S.Ct. 784, 790, 5 L.Ed.2d 838 (1961); *United States v. Grizzard*, 219 U.S. 180, 185-86, 31 S.Ct. 162, 164, 55 L.Ed. 165 (1911); *Shepherd v. Baltimore & O.R. Co.*, 130 U.S. 426, 433, 9 S.Ct. 598, 601, 32 L.Ed. 970 (1889); *United States v. Trout*, 386 F.2d 216, 221 (5th Cir. 1967); *Stephenson Brick Co. v. United States*, 110 F.2d 360, 361 (5th Cir. 1940). When the property interest taken from a parent tract is merely an easement, the proper measure of damages is still the before-and-after method of valua-

[4] A partial taking generally refers to an appropriation in fee of a portion of a larger tract. *United States v. 158.24 Acres of Land, in Bee County, Texas*, 515 F.2d 230, 232 (5th Cir. 1972).

tion, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement. *Virginia Electric*, 365 U.S. at 630, 81 S.Ct. at 789; *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 78 L.Ed. 1236 (1934); *158.4 Acres of Land, in Bee County, Texas*, 515 F.2d at 232; *United States v. Brumfield*, 354 F.2d 882 (5th Cir. 1966); *Slattery Company v. United States*, 231 F.2d 37 (5th Cir. 1956). *See also United States v. 1,129.75 Acres of Land, etc.*, 473 F.2d 996, 998 (8th Cir. 1973). This Court in *Tranwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969), explicitly upheld the appropriateness of this method for valuing pipeline easements.[5]

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[5] 4A Nichols, *The Law of Eminent Domain* § 14.31 (rev. 3d ed. 1981) notes at least two methods by which just compensation in partial taking cases can be ascertained. The first is the *before-and-after* method of valuation, which computes damages to be the difference in the value of the entire parent tract before the taking and the value of the portion remaining after the taking. The second method computes damages as the value of the actual land taken plus the diminution in the value of the remaining land in the parent tract. Both methods take into consideration the loss of the part taken and "severance damages" to the remainder of the property left after the taking.

The Fourth Circuit *allows* use of the second method. *United States v. 97.19 Acres of Land, More or Less*, 582 F.2d 878, 881 (4th Cir. 1978). Texas law *requires* the second method: namely, awarding the fair market value of the *strip actually taken*, plus damages for any diminution in value of the landowner's remaining property by virtue of the severance or use to which the strip taken is to be put. *State v. Meyer*, 403 S.W.2d 366, 371 (Tex. 1966); *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194, 197 (1936).

The applicable federal law in the Fifth Circuit, however, requires the *exclusive* use of the before-and-after method of valuation. In *Transwestern, supra*, this Court stated that the correct measure of value in a federal court condemnation substantially conformed to Transwestern's requested charge to the Condemnation Commission, which recites as follows:

> [T]hat the sum of the compensation for the damages to the strip of land which is subject to condemnation and the damage to the remaining tract shall be the equivalent to the compensa-

The district court, however, has held that each condemned strip of land is the appropriate "parent tract" for purposes of valuation, because it was "severed" from the remaining acreage within the property lines of each KWW and Firestone tract. When applicable, the issue of unity or separateness of tracts is a question of fact to be presented to the trier of fact. *United States v. Reynolds*, 397 U.S. 14, 18-19, 90 S.Ct. 803, 806-807, 25 L.Ed.2d 12 (1970); *United States v. 3276.21 Acres of Land*, 194 F. Supp. 297 (S.D. Cal. 1961). Three factors are particularly helpful in ascertaining whether property taken is part of a single, larger tract: physical contiguity, unity of ownership, and unity of use. Nichols, 4A *Eminent Domain* (1981 Supp.) at 14-393, 14-416, 14-424; *Babinec v. State*, 512 P.2d 563 (Sup. Ct. Alaska 1973). When an owner actually uses parts of what would otherwise constitute a unified tract for different or separate purposes, however, the parts may be held to be functionally "separate" tracts, though they are not physically separate.[6] *See Sharp v. United States*, 191 U.S. 341, 24

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tion determined by comparing the fair market value of the entire tract affected by the taking before and after the taking; that is to say, it should be equivalent to the sum of money obtained by subtracting the fair market value of what remains after the taking, from the fair market value of the whole immediately before the taking.

See also 158.24 Acres of Land, in Bee County, Texas, 515 F.2d at 233.

[6] The "unity" of a tract normally becomes an issue where landowners are seeking to qualify for "severance damages" to property not taken. A landowner is not entitled to severance damage compensation for injury to separate and independent parcels belonging to him which results from the taking. *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 87 L.Ed. 336 (1942). In the instant case, the landowners wish to disclaim any severance damages to the remaining tract and demonstrate that what appears to be a unified tract is actually two "separate" tracts. In this manner, the landowners wish to characterize the strip of land burdened by the easements as a separate "pipeline corridor," which will command a higher compensation award.

S.Ct. 114, 48 L.Ed. 211 (1903); *United States v. Honolulu Plantation Co.*, 182 F.2d 172, 179 (9th Cir. 1950) Integrated use is the key test for unity of a tract. *Baetjer v. United States*, 143 F.2d 391 (1st Cir. 1944). *See also, United States v. Easements Upon 104.09 Acres of Land*, 442 F. Supp. 926, 927 (E.D. Wash. 1977).

If the district court adopts a condemnation commission's findings, the court of appeals must accept the findings, as adopted by the district court, unless they are "clearly erroneous." *United States v. Merz*, 376 U.S. 192, 84 S.Ct. 639, 643, 11 L.Ed.2d 629 (1964); *Sharp v. United States*, 24 S.Ct. at 117. *See also United States v. 403.14 Acres of Land*, 553 F.2d 565, 570 (8th Cir. 1977). The district court in the instant case adopted the Commission's finding that the strips of land burdened by the easement condemnations were severed from the larger 700-acre parcel owned by KWW and the 1100-acre two-tract parcel owned by Firestone. The Commission based this finding upon the pipeline alley already in the area and the previous permanent pipeline easements sold on the parent tracts.

In each instance, however, the condemned strip of land had an integrated use with the parent tract—namely, pastureland. There was no evidence in the Commission's recommendations and findings that pipelines existed in the fifty-foot strip of land at issue.[7] Neither did each

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[7] The Commission's finding that the condemned strips of land were "severed" from the parent tracts, recites, in pertinent part, as follows:

> [t]he Commission was faced with the problem of a piece of property, admittedly attached to and adjacent to a larger tract of property owned by the same land owner, however, having been severed by uses inconsistent with the use of the balance of the property. The particular tracts under consideration have been effectively severed from the main body of the ownership by previous easements and grants given to others. These easements caused an alienation of the use of the particular tracts here condemned. They are in this particular alley being used for pipelines. * * * The Commission has taken into consid-

condemned strip of land lie between existing pipelines, but rather at the edge of a large .eld adjacent to existing pipeline easements. The lando ners had taken no steps to sever the condemned strips of land from the rest of the property. The landowners' witnesses could not even convincingly define the exact parameters of the "potential" pipeline corridor within which the fifty-foot condemned strip of land was located. The mere fact that the landowners hoped that these tracts would be acquired for pipeline purposes did not sever them from the rest of the land.[8] *See Cole Investment Co. v. United States*, 258 F.2d

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eration that the usual way of appraising property is to take the parent tract's valuation and subtract therefrom the value of the part left in the land owner, thus giving credit for enhancement or devaluation of surrounding property still in the hands of the land owner. It is felt in this particular situation that this method of appraisal is inappropriate in that by the granting of easements which are perpetual in nature, the land owner has previously severed these tracts from the parent tract leaving a remainder that must stand on its own feet.

[8] In *158.24 Acres of Land, in Bee County, Texas*, 515 F.2d at 232, this Court appears to have allowed evidence of the highest and best "potential" use, as well as existing use, of land for the purpose of determining whether the parcel is separate and independent, or part of the whole. *See also United States v. 105.40 Acres of Land, etc., Porter County, Ind.*, 471 F.2d 207 (7th Cir. 1972). *But see Cole Investment Co., supra; Easements Upon 104.09 Acres of Land, supra.* Potential use, however, may be weighed only if there is a "reasonable probability" the lands in question will be put to that use in the reasonably near future. *See United States for Use of T.V.A. v. Powelson*, 319 U.S. 266, 63 S.Ct. 1047, 87 L.Ed. 1390 (1943); *158.24 Acres of Land in Bee County, Texas, supra.* Furthermore, potential use is only one factor to consider in determination of the "unity" issue, along with unity of ownership, contiguity, and existing use.

In the instant case, the landowners demonstrated no existing plan to place more pipelines in the corridor in the immediate future. Testimony by Willard Hall on the potential use of the land over the next "twenty-five years" was speculative. Furthermore, existing use, unity of legal title, and contiguity clearly outweighed any possible potential use of the condemned strip for purposes of

203, 205 (9th Cir. 1958). This Court therefore determines that the Commission was clearly erroneous in finding that the strips of condemned land were "severed" from their parent tracts.

Because the district court erred in categorizing the strip of land as a "separate parcel," it also erred in rejecting the "before-and-after" method of valuation of the larger tract. Accordingly, this Court must remand this cause to the district court so the Commission may properly determine compensation by comparing the fair market value of the parent tracts before and after the taking.

III. *Evidence of Highest and Best Use*

The district court also accepted the Commission's finding that pipeline right-of-way was the highest and best use of the condemned property. Accordingly, the district court based its compensation award on the landowners' evidence of comparable sales of pipeline easements in the area. The Government contends the district court erred in basing its compensation award on such evidence.

An owner of lands to be condemned is entitled to their "market value fairly determined." *United States v. Miller*, 317 U.S. 369, 63 S.Ct. 276, 280, 87 L.Ed. 336 (1943). The value is to be ascertained as of the date of the taking. *United States v. Reynolds*, 397 U.S. 14, 90 S.Ct. 803, 805, 25 L.Ed.2d 12 (1970), *Miller, supra.* The burden of establishing the value of lands sought to be condemned is on the landowner. *Powelson*, 63 S.Ct. at 1052.

In determining the market value, this Court must look not only at the present use of the property, but also at the highest and best use for which the property is adaptable and needed. *United States v. Buhler*, 305 F.2d 319, 327 (5th Cir. 1962); *Cameron Development Co. v.*

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determining the unity of the condemned and remaining parcels. To allow a district court under such speculative and imprecise conditions to "sever" a parcel for the purpose of awarding a very high compensation award would unfairly strain the federal treasury.

United States, 145 F.2d 209, 210 (5th Cir. 1944). There is a presumption, however, in favor of the existing use of the land which can only be overcome if the landowner can show the reasonable probability that the property, at the time of the taking, was adaptable and needed, or likely to be needed in the near future, for the potential use. *Olson v. United States*, 292 U.S. 246, 54 S.Ct. 704, 708-709, 78 L.Ed. 1236 (1934). The district court must also value the property as a whole rather than the sum of the various uses to which it has been placed. *United States v. Certain Parcels of Land in Rapides Parish, La.*, 149 F.2d 81, 82 (5th Cir. 1945). The value of separate interests cannot exceed the worth of the whole. *United States v. Dunnington*, 146 U.S. 338, 351, 13 S.Ct. 79, 83, 36 L.Ed. 996 (1892); *see Texas v. Harris County, Houston Ship Channel Navigation District*, 158 F.2d 861, 865 (5th Cir. 1946). The best evidence of market value is comparable sales—*i.e.*, sales from a willing seller to a willing buyer of similar property in the vicinity of the taking at or about the same time as the taking. *Trout*, 386 F.2d at 222-23.

The Commission heard no evidence supporting a finding that the highest and best use of the entire parent tracts was for pipeline right-of-way. The Commission, therefore, had no justification for basing its compensation award on evidence of comparable sales of pipeline easements. The Commission's findings on use and market value are, therefore, clearly erroneous, and the district court erred in adopting them.

In contrast, the Government's characterization of use and value was appropriate and proper. The Government's valuation witness testified that the highest and best use of the parent tracts was for industrial plant sites; it was based upon the large number of industrial plants in the immediate area. He correctly based his assessment of market value on evidence of five valid comparable sales of industrial property in the area at the time of the taking. His estimate of damages to the landowners was, therefore, appropriate and uncontested.

In an exercise of the power of eminent domain, due process requires that the owners be given an opportunity to be heard on the issue of compensation. *Bragg v. Weaver*, 251 U.S. 57, 58-59, 40 S.Ct. 62, 63 (1919). The landowners had an opportunity to prove the market value of the tracts was higher than established by the Government, but failed to meet this burden; they only presented evidence of comparable sales of pipeline right-of-way. Accordingly, it is unnecessary to conduct additional hearings on determining the fair market value of the parcels. The cause is thus remanded to the district court for determination of the fair market value, with instructions to rely upon the evidentiary record as it presently exists. In calculating the fair market value, the district court shall consider the highest and best use of the tracts as industrial plant sites and shall base an award of compensation for both permanent and temporary easements upon the evidence of comparable sales submitted by the Government.[9]

The district court's judgment is reversed and this cause remanded for an award of compensation based upon the before-and-after method of valuation utilizing the Government's evidence of comparable sales for industrial plant sites.

REVERSED AND REMANDED.

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[9] The Government's contention that the comparable pipeline right-of-way sales reflected "hold-up value" rather than "fair market value" need not be addressed because this Court has determined that the district court was clearly erroneous in establishing the highest and best use of the land taken as pipeline right-of-way.

The Government also contends the district court erred in making provision for the landowners to return for additional compensation if the Government actually places additional pipelines in the area covered by the easement. Because the highest and best use of the parent tracts has been established to be for industrial plant sites and the "damage" occurred when the Government laid a single pipeline within the easement, no additional compensation is appropriate or possible beyond that required by the before-and-after method of valuation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 81-2136

D.C. Docket Nos. B-78-169-CA-1547-3,
B-78-170-CA-1547-3 & B-78-176-CA-1517-3

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

8.41 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and KWW ASSOCIATES, *et al.* and UNKNOWN OWNERS,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

5.00 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

6.90 ACRES OF LAND, MORE OR LESS, SITUATED IN ORANGE COUNTY, STATE OF TEXAS, and FIRESTONE TIRE AND RUBBER COMPANY, *et al.* and UNKNOWN OWNERS,
Defendants-Appellees.

Appeals from the United States District Court
for the Eastern District of Texas

[July 14, 1982]

Before DYER *, JOHNSON and WILLIAMS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be and the same is hereby remanded to the said district court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that appellees pay to appellant the costs on appeal to be taxed by the Clerk of this Court.

July 14, 1982
/s/ Peggy D. Keller

Issued as Mandate:

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* Circuit Judge of the Eleventh Circuit, sitting by designation.

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2080

UNITED STATES OF AMERICA,
Petitioner.

Appeal from the United States District Court
for the Eastern District of Texas

[Filed Feb. 22, 1983]

Before RUBIN, JOHNSON, and WILLIAMS, Circuit Judges.

PER CURIAM:

Upon remand to the district court the instruction of this Court was that the determination of fair market value was to be made in reliance "*Upon the evidentiary record as it presently exists.*" (emphasizes added).

This Court's mandate directed that the record was to be considered closed, and judgment was to be entered in accordance with the government's theory of valuation on the government's evidence of comparable sales for industrial plant sites. It is of course the responsibility of the district court to follow the mandate of this Court without deviation, Briggs v. Pennsylvania Railroad Company, 68 S. Ct. 1039, 1040 (1948) and we are confident that the able and experienced district judge will do so.

Therefore considering the reply brief and the very limited nature of the testimony that this brief indicates it is likely to be adduced, the motion for writ of mandamus is DENIED.

APPENDIX G

UNITED STATES DISTRICT COURT
E.D. TEXAS
BEAUMONT DIVISION

Civ. A. Nos. B-78-169-CA-1547-3,
B-78-170-CA-1547-3 and
B-78-176-CA-1547-3

UNITED STATES OF AMERICA

v.

8.41 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, KWW ASSOCIATES, *et al.*

UNITED STATES OF AMERICA

v.

5.00 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, THE FIRESTONE TIRE & RUBBER CO., *et al.*

UNITED STATES OF AMERICA

v.

6.90 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, THE FIRESTONE TIRE & RUBBER CO., *et al.*

May 13, 1983

MEMORANDUM OPINION

JOE J. FISHER, District Judge.

This land condemnation case is before the court on remand from the Court of Appeals for the Fifth Circuit.

That court reversed the compensation award of the district court and remanded "for determination of the fair market value, with instructions to rely upon the evidentiary record as it presently exists." *United States v. 8.41 Acres of Land, etc.*, 680 F.2d 388, 395 (5th Cir. 1982).

I. BACKGROUND

The Government took easements for the construction of pipelines for the Strategic Petroleum Reserve program. From two tracts owned by The Firestone Tire and Rubber Company (Firestone), the Government took 6.9 acres. From an adjacent tract owned by KWW Associates (KWW), it took 5.3 acres. The Department of Energy (DOE) placed a 42 inch pipeline in the easement.

The court appointed a three-man condemnation commission to determine awards for the takings of perpetual, assignable, 50 foot easements for multiple pipelines and 25 foot "temporary work easements" of three years duration. After consolidating the actions for trial, the court affirmed the awards of the commission and entered judgments of $164,611 for Firestone and $96,200 for KWW. *United States v. 5.00 Acres Of Land, etc.*, 507 F. Supp. 589 (E.D. Tex. 1981).

The Government appealed the compensation awards. It argued that the district court erred in accepting the findings of the commission that:

(1) the pipeline easements were "effectively severed" from the parent tracts;

(2) the "before-and-after" method of valuation was therefore inappropriate;

(3) the highest and best use of the taken land was as a "pipeline corridor," and that

(4) the appropriate comparable sales by which fair market value should be determined were other sales of pipeline easements.

Those findings were based primarily upon evidence presented by the landowners.

In reaching its conclusions, the commission heard and considered contrary evidence and argument presented by the Government that:

(1) the taken land was not "severed" from the 252 acre, 340 acre, and 175 acre parent tracts;

(2) for such a "partial taking," the "before-and-after" method of valuation was proper;

(3) the highest and best use of the land taken was for "industrial sites;" and that

(4) the appropriate comparable sales by which fair market value should be determined were sales of "industrial sites" in the general vicinity at the time of the taking.

All evidence introduced by the Government was ostensibly consistent with the above theory.

Embracing the argument of the Government, the Court of Appeals rejected the commission's fact findings on use and value as "clearly erroneous." The court believed that "in contrast," the Government's "characterization of use and value was appropriate atnd proper." *United States v. 8.41 Acres of Land, etc.*, 680 F.2d 388, 395 (5th Cir. 1982).

The testimony of valuation witnesses did not, strictly speaking, conflict directly, because the parties had presented their cases under different theories of valuation. The experts' estimates of damages to the landowners, however, differed by a factor of six. Nevertheless, the Court of Appeals concluded that the Government's estimate of damages to the landowners was not only "appropriate," but "uncontested," as well. *Id.* In fact, the landowners' expert testified that damages to Firestone exceeded $164,611 and to KWW, $96,200; in contrast, the

Government's evidence indicated damages to Firestone of $27,936 and to KWW, $20,178.

The Court of Appeals noted that the landowners had presented evidence under an "unorthodox theory," *id.* at 391, erroneously accepted by the district court. Reasoning that the landowners had already been given an opportunity to be heard on the issue of damages and had failed to meet their burden, the court concluded that due process requirements had been met. Accordingly, the court indicated "it is unnecessary to conduct hearings on determining the fair market value of the parcels." *Id.*

While the district court realized that further hearings were not absolutely necessary in determining the fair market value of the parcels, it ordered them nonetheless. The court believed that fundamental principles of due process and fairness required that the landowners be given a reasonable chance to protect their property interests against the coerced taking by the Government. Moreover, the court discerned no harm in additional hearings.

The court ordered a hearing for October 24, 1982 on the parties' motions for awards of just compensation and entry of judgment according to the mandate of the Court of Appeals. The court feared that the landowners had been penalized for relying on an "unorthodox theory" in previous proceedings. Out of a sense of fairness and an abundance of precaution, the court gave all the parties an opportunity to offer additional evidence at the hearing. The Government strongly objected. It argued that the court was forbidden to consider any evidence of fair market value except that already presented by the Government. Accordingly, the Government refused to offer additional evidence at the hearing and objected to testimony by the landowners' experts. The landowners offered evidence which reinforced evidence in the record that a pipeline corridor existed in the area. They also

presented evidence showing that the Government's perpetual, assignable right to lay multiple pipelines damaged their property more than an ordinary pipeline easement.

Following a careful review of the evidentiary record in light of the mandate of the Court of Appeals, the court determined that further clarification and interpretation of the existing evidence would be helpful. The court ordered a final hearing for February 24, 1983, inviting the parties to present argument and testimony "based on the existing evidentiary record," as to the "before-and-after" values of the tracts.

On February 8, 1983 the Government petitioned the Court of Appeals for a writ of mandamus to this court. The petition alleged that the district court violated the mandate of the Court of Appeals by ordering the hearing. In its order denying the petition, the Court of Appeals reiterated the command of the mandate: "that the record was to be considered closed, and judgment was to be entered in accordance with the Government's theory of valuation on the Government's evidence of comparable sales for industrial plant sites." *In re United State of America*, no. 83-2080 (5th Cir. Feb. 22, 1983).

At the final hearing the Government insisted that the landowners were not entitled to another opportunity—having "waived" their first by relying on their "unorthodox theory"—to present evidence contesting the Government's valuations. Accordingly, the Government declined to provide clarification or interpretation of its evidence and objected to the landowners' efforts. Willard J. Hall testified for the landowners, reviewing the testimony of the Government's expert witness, Jack Aulbaugh, before the commission. Hall explained some of the comparable sales offered by the Government were largely marshland or in the flood plain, unlike the landowners' tracts. He expressed his opinions of the "before-and-after" values of the tracts, as well.

The court has diligently reviewed the record, the briefs of the parties, and the opinion and mandate of the Court of Appeals. The court is of the opinion that the two hearings described above did not aid the court in determining the damage done to the landowners by the Government. The testimony at the hearings did not help the court determine the "before-and-after" values of the tracts because it did not address the proper theory of valuation. At most, the hearings merely created the appearance that the landowners received due process of law, in spite of the Government's repeated and inexplicable objections. By necessity, the court relies on the pre-hearings evidence introduced by the Government to determine the two *distinct* elements of just compensation due the landowners: damages for the permanent partial taking, the actual pipeline easement; and damages for the temporary occupancy, the work easement.

II. HIGHEST & BEST USE VALUATION BASED ON COMPARABLE SALES

In endorsing the evidence and valuation theory presented by the Government, the Court of Appeals ostensibly approved Aulbaugh's estimates of damages to the landowners. While the district court is duty bound upon remand of a case to proceed in accord with the mandate and such law of the case as was established by the appellate court, *see e.g., Conway v. Chemical Leaman Tank Lines, Inc.*, 87 F.R.D. 712, 715 (E.D.Tex.1980), *aff'd* 644 F.2d 1059 (5th Cir.1981), *reh'g denied* 650 F.2d 282, the court does not understand the mandate or the opinion to require the court to perfunctorily and indiscriminately adopt all the conclusions of the Government's valuation expert. Moreover, such conclusions as are not supported by the evidence or as are incompatible with the law of the case must surely be rejected. A review of the Government's valuation evidence follows.

The Government valuation witness opined that the highest and best use of the parent tracts was as "in-

dustrial tracts . . . compatible with the uses in the neighborhood." In estimating the values of the tracts, he relied on five comparable sales of "industrial sites" in the area. They ranged in value from $2,000 to $6,000 per acre.

Two of the comparable sales were at substantially lower values than the others. Presumably, Aulbaugh considered the physical differences between the comparable sales and the damaged tracts, making allowances for marshy conditions and the likelihood of flooding.

The highest comparable sale, $6,000 per acre, occurred some 2.5 years before the taking. He did not adjust that price to allow for the rise in land prices during the intervening period. Aulbaugh regarded it as superior to the Firestone and KWW tracts because the tract was on the Neches River and near Interstate 10.

While it is surely a mere coincidence, it is interesting that Aulbaugh's opinion of the average per acre fair market value of the subject tracts, $3,500, barely differs from the average value of his five comparable sales: $3,463.80 per acre.

The Government purported to be, and perhaps believed that it was, properly utilizing the "before-and-after" method of valuation in determining just compensation to the landowners. That method "computes damages to be the difference in value of the entire tract before the taking and the value of the portion remaining after the taking." *U.S. v. 8.41 Acres of Land, etc.*, 680 F.2d 388, 392 n. 5 (5th Cir.1982). *See also U.S. v. 158.24 Acres of Land, etc.*, 515 F.2d 230, 233 (5th Cir. 1975); *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969).

Aulbaugh said that his compensation figures equalled the differences between the fair market values of the tracts immediately before and immediately after the

acquisition of the easements. He explained, however, that the figures included compensation not only for the permanent pipeline easements, but for the temporary work easements, as well.

Moreover, Aulbaugh derived his compensation figures, *before* he established the "after taking" values. Indeed, his "after taking" values were derived not on the basis of the valid comparable sale in evidence, but by subtracting the improperly derived combined damage elements from the valid "before taking" values of the parent tracts.

He did this by, first valuing the actual area of the permanent easements taken at the parent tracts' average per acre "before taking" value of $3,500, reduced by 10% for rights remaining in the landowners after the taking. Second, he diminuted the remaining property by $1,120 per acre of temporary work easement. He allowed an additional $3,500 of "severance damages" to the Firestone property because the pipeline separated two acres from one parent tract, making that area useless as an industrial site. Third, Aulbaugh combined the above figures, and then backed his way into the "before-and-after" formula—subtracting the remainder from the minuend in order to derive the subtrahend, a technique akin to defining one's minor premise in order to support a preconceived conclusion.

Although the Government couched its presentation in the language of "before-and-after" valuation, Aulbaugh did not use that method to determine just compensation. To the contrary, the Government expert used a second method, required under Texas law, allowed in the Fourth Circuit, but forbidden in the Fifth Circuit:

> * * * awarding the fair market value of the *strip actually taken*, plus damages for any diminution in value of the landowner's remaining property by vir-

> tue of the severance or use to which the strip taken is to be put * * * [citations omitted].
>
> The applicable federal law in the Fifth Circuit, however, requires the *exclusive* use of the before-and-after method of valuation * * *

U.S. v. 8.41 Acres of Land, etc., 680 F.2d 388, 392 n. 5 (5th Cir.1982). Accordingly, the court is compelled to reject the opinion of the Government's expert as to just compensation because he failed to use the "before-and-after" method of valuation. Moreover, Aulbaugh's expressed opinion of the value of the parent tracts *after* the taking was not based on evidence of a valid comparable sale; the court therefore finds that his opinion is not credible as to the "after taking" values. The court does not, however, reject the Government's evidence of comparable sales or the opinion of its expert as to the fair market value of the parent tracts *before* the taking. The court relies on the latter evidence, as explained below, to "properly determine compensation by comparing the fair market value of the parent tracts 'before-and-after' the taking." *Id.* at 394.

III. JUST COMPENSATION FOR THE PERMANENT EASEMENTS TAKEN

The evidence introduced by the Government supports the opinion of their expert that the average per acre value of the tracts *before* the taking was $3,500. The expert cited a comparable sale of an industrial site not burdened with permanent easements for $3,615 per acre. The only evidence of the average value per acre *after* the taking conclusively establishes a reduced value. The Government evidence shows that a comparable sale of an industrial tract similar in size and location to the latter tract, but burdened with a public utility company right of way along its frontage, brought only $3,150 per acre.

Those valid comparable sales of industrial property in the area at the time of the taking conclusively establish an "*after* taking" average value per acre that is $465 less than the value of like property *before* such taking.

Moreover, the particular comparable sale indicative of the "after taking" value of the tracts involves an easement remarkably analogous to the DOE pipeline easement, although not as invasive. The Gulf States easement, like the DOE pipeline easement, is perpetual and forecloses the possibility of construction thereon. It almost certainly entails the right to install an unlimited number of additional or larger lines, as well as the right to replace already existing ones. In this respect both the Gulf States right of way and the DOE pipeline easement most markedly differ from the ordinary pipeline easement wherein each replacement or addition of a line requires compensation of the landowner. It it precisely those elements—the *perpetual right* to install *unlimited lines* through the easement—that make the DOE pipeline easement most damaging to a landowner, in contrast to a conventional pipeline easement involving only one line and no future invasions of the property. The Gulf States easement is less invasive than the DOE pipeline easement because any future line installation will be overhead, while DOE cannot install additional lines without actually blocking surface access to the tract for extended periods of time.

Because the existing pipeline easements on the Firestone tracts are of the conventional type and do not allow for future uncompensated invasions of the property, the court accepts the opinion of the Government's expert witness that the Firestone tracts have average per acre values equal to the KWW tract.

Based upon the evidence of comparable sales presented by the Government, the court finds that:

(1) the average per acre value of the parent tracts *before* the taking of the perpetual, assignable, multiple pipeline easement by DOE was $3,500; and

(2) the average per acre value of the parent tracts *after* the taking was $3,035. In the table below, these values are applied to the areas of the damaged tracts.

The above findings of fact are solidly and exclusively grounded upon the Government's evidence in the record. The open-ended nature of the DOE pipeline easement—the perpetual, assignable right to lay unlimited pipelines—is such a burden on the land as to sharply reduce the value of the parent tracts. DOE or an assignee can at any and all times construct additional pipelines or replace existing ones. Necessarily, there is no longer assured access to the tracts from Highway 1006. While the Firestone and KWW tracts were each accessible from two highways before the taking, each now has assured access from but one. Indeed, the Firestone tracts lost half their useful highway frontage because of the taking.

IV. JUST COMPENSATION FOR THE TEMPORARY EASEMENTS TAKEN

The remaining element of damages is for the temporary taking of work easements adjacent to the 50 foot pipeline easement. DOE took 1.96 and 2.78 acre work easements on the Firestone tracts, and on the KWW tract, a 3.11 acre work easement. As explained above, the Government attempted to use the "before-and-after" method to determine damages for the temporary takings along with the permanent ones.

For a temporary occupancy, the proper measure of damages is the rental value of the property taken. *Kimball Laundry Co. v. U.S.* 338 U.S. 1, 69 S.Ct. 1434, 93 L.Ed 1765 (1948). That damage rule is appropriate here because DOE took the right to occupy and use additional land for a three year period. DOE styled the taken property right a "temporary work easement," but it was

entitled to virtually unrestricted surface use of the area for three years just as if it had acquired a leasehold.

The "before-and-after" method prescribed by the Court of Appeals for the permanent partial taking, i.e., the pipeline easement itself, is totally inappropriate for the calculation of damages from a temporary taking. In explicitly rejecting that method, the Court observed in *Kimball Laundry* that

> * * * if the difference between the market value of the fee on the date of the taking and that on the date of return were taken to be the measure, there might frequently be situations in which the owner would recover no compensation whatever because the market value of the property had not decreased during the period of the taker's occupancy.

Id. at 7, 69 S.Ct. at 1438. In prescribing rental value as the exclusive measure of damages for temporary takings, the Court explained that "determination of the value of temporary occupancy can be approached only on the supposition that free bargaining between [the owner] and a hypothetical lessee of that temporary interest would have taken place in the usual framework of such negotiations." *Id.*

The equitable principle enunciated in *Kimball Laundry* was reiterated by the Court in a later case involving the taking of a leasehold. The principle, simply stated, is this: the Government should not be allowed to escape paying what a willing buyer would pay for the same property. *See Almota Farmer's Elevator and Warehouse Co. v. U.S.*, 409 U.S. 470, 93 S.Ct. 791, 35 L.Ed.2d 1 (1972). This notion is implicit in the "unorthodox theory" presented by the landowners and is noticeably absent from the Government position in this case. Although the Government did not introduce evidence showing what a willing buyer would pay to rent the work easement, neither did the landowners. The landowners simply failed to take the precaution of presenting evidence under

the conventional, accepted theory of valuation in this Circuit.

It is true that both parties presented evidence of what a willing buyer would pay for the same property, if the same property is defined as pipeline easements. The Government expert noted sales around $13,000 per acre and the landowners' expert described a price range from $13,000 to $52,000 per acre with most sales at $19,000 per acre of pipeline easement. Even though sales of pipeline easements are not evidence of valid comparable sales and cannot be used in determining the value of the permanent taking, the sales included compensation for a temporary work easement. Had the experts testified as to the percentage of the price attributable to the work easement, the court would have had evidence of the rental value of the property temporarily taken. No such evidence was presented however, and the court must rely instead on the approach expounded by the Government.

The Government method of determining the value of the temporary taking was to apply a 13.5% rate of return to the average value per acre of the parent tracts times the acreage of the temporary work easements, discounted to present value. The product of that computation equals 32% of the work easement land value. In the absence of evidence to the contrary, the court accepts the computed value as a reasonable approximation of the rental value of the temporary taking. The Government valuation expert's 32% factor is applied to the average per acre "*after* taking" value of the parent tracts to determine the rental value of the temporary work easements, as shown in the table below.

V. JUST COMPENSATION CALCULATIONS

Applying the evidence discussed above to the prescribed theories of valuation, the court finds that the just compensation for the takings is as set forth below:

A. FIRESTONE PROPERTY

Parent Tract 338 = 252 acres

1. Sub-tract E-1 (3.8 acres permanent, assignable, multiple pipeline easement)

Fair Market Value Before Taking

252 acres @ $3,500/acre = $ 882,000.00

Fair Market Value After Taking

252 acres @ $3,035/acre = — 764,820.00

Just Compensation for Permanent Taking $ 117,180.00

2. Sub-tract E-2 (2.78 acres temporary work easement)

Fair Rental Value of Temporary Taking

2.78 acres @ $3,035/acre × 0.32 = 2,699.94

Parent Tract 314 = 340 acres

1. Sub-tract E-3 (3.05 acres permanent, assignable, multiple pipeline easement)

Fair Market Value Before Taking

340 acres @ $3,500/acre = $ 1,190,000.00

Fair Market Value After Taking

340 acres @ $3,035/acre = —1,031,900.00

Just Compensation for Permanent Taking 158,100.00

2. Sub-tract E-3 (1.96 acres temporary work easement)

Fair Rental Value of Temporary Taking

1.96 acres @ $3,035/acre × 0.32 = + 1,903.55

TOTAL COMPENSATION DUE FIRESTONE ON DATE OF TAKING $ 279,883.49

LESS: Estimated Compensation Deposited into Registry of the Court — 18,964.00

DEFICIENCY DUE FIRESTONE as of March 7, 1978 $ 260,919.49

PLUS: Accrued Interest on Deficiency to Date +179,098.12

TOTAL DEFICIENCY + INTEREST as of May 13, 1983 $ 440,017.61

B. KWW PROPERTY

Parent Tract 313 = 175 acres

1. Sub-tract E-1 (5.3 acres permanent, assignable, multiple pipeline easement)

Fair Market Value Before Taking

175 acres @ $3,500/acre = $ 612,500.00

Fair Market Value After Taking		
175 acres @ $3,035/acre=	— 531,125.00	
Just Compensation for Permanent Taking		$ 81,375.00
2. Sub-tract E-2 (3.11 acres temporary work easement)		
Fair Rental Value of Temporary Taking 3.11 acres @ $3,035/acre × 0.32=		+ 3,020.43
TOTAL COMPENSATION DUE KWW ON DATE OF TAKING		$ 84,395.43
LESS: Estimated Compensation Deposited into Registry of the Court		— 30,888.00
DEFICIENCY DUE KWW from & including March 7, 1978		$ 53,507.43
PLUS: Accrued Interest on Deficiency to Date		+ 36,728.11
TOTAL DEFICIENCY + INTEREST as of May 13, 1983		$ 90,235.54

VI. CONCLUSION

In granting the landowners' Motion for Award of Interest, the court acknowledged that the Fifth Amendment requires the payment of interest as an element of just compensation where the date of the taking precedes the payment of the award. *U.S. v. 5.00 Acres of Land, etc.*, 501 F. Supp. 589, 598-99 (E.D. Tex. 1981). The court then awarded the landowners interest on the deficiency at the interest rate "applicable to three-year Treasury bonds purchased on the date of taking," it having been almost three years since the taking. Inasmuch as the judgment of the district court was reversed on other grounds and another 28 months have elapsed since the motion was granted, the court awards interest on the deficiencies as follows:

(1) at the rate applicable to Treasury notes issued nearest the date of taking, to wit, 7.875%, for the three year period beginning March 7, 1978;

(2) at the rate applicable to Treasury notes issued nearest March 7, 1981, to wit, 13.75%, for the period beginning that date until the payment of the award; and

(3) since interest on the Treasury notes is payable semi-annually, the interest on the deficiencies shall be compounded semi-annually.

Judgment will be entered in favor of the defendants, THE FIRESTONE TIRE & RUBBER CO. and KWW ASSOCIATES, for compensation and interest according to this opinion and as more fully described in the Final Judgment entered this date, and it is, furthermore

ORDERED, ADJUDGED, and DECREED that the Amended Report and Findings of the Condemnation Commission, except as modified in this Memorandum Opinion, is otherwise approved, ratified, and adopted.

APPENDIX H

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 83-2427

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND KWW ASSOCIATES, *et al.*,
Defendants-Appellees.

May 14, 1984

Appeal from the United States District Court
for the Eastern District of Texas

Before GEE, RANDALL and JOHNSON, Circuit Judges.

PER CURIAM:

This condemnation proceeding arises out of the taking of several multiple pipeline easements by the Government for construction of the Strategic Petroleum and Reserve Pipeline. We need not rehash the prior events in this protracted litigation, as the case history is set forth at length in *United States v. 8.41 Acres of Land, etc.*, 680 F.2d 388 (5th Cir. 1982), an opinion of this Court written on a prior appeal in this case. In that opinion, this Court reversed the district court's judgment, 507 F. Supp. 589, and remanded with instructions for the district court to render a judgment based upon the existing evidentiary record; this Court stated that it was unnecesesary to conduct additional hearings.

Upon remand, nevertheless, the district judge, *sua sponte* ordered additional evidentiary hearings and proceeded to hear evidence. The Government sought a writ of mandamus from this Court directing the district court to comply with this Court's prior order. This Court declined to grant the writ of mandamus. The district judge continued to hear new evidence and thereafter rendered a judgment that awarded the landowners substantial severance damages unsupported by evidence other than that adduced in the additional evidentiary hearings, 576 F. Supp. 685. The Government appeals to this Court alleging that the district court violated this Court's clear mandate. We reverse and remand.

The declaration of this Court[1] in the prior appeal with regard to the outcome and the district court's task on remand was very clear.

> In an exercise of the power of eminent domain, due process requires that the owners be given an opportunity to be heard on the issue of compensation. *Bragg v. Weaver*, 251 U.S. 57. 58-59, 40 S.Ct.

[1] Before the initial or first panel of this court to hear this case.

62, 63 [64 L.Ed. 135] (1919). The landowners had an opportunity to prove the market value of the tracts was higher than established by the Government, but failed to meet this burden; they only presented evidence of comparable sales of pipeline right-of-way. Accordingly, *it is unnecessary to conduct additional hearings on determining the fair market value of the parcels.* The cause is thus remanded to the district court for determination of the fair market value, *with instructions to rely upon the evidentiary record as it presently exists.* In calculating the fair market value, the district court shall consider the highest and best use of the tracts as industrial plant sites and *shall base an award of compensation for both permanent and temporary easements upon the evidence of comparable sales submitted by the Government.*

The district court's judgment is reversed and this cause remanded for an award of compensation based upon the before-and-after method of valuation *utilizing the Government's evidence of comparable sales for industrial plant sites.*

United States v. 8.41 Acres of Land, 680 F.2d at 395, (emphasis added).

The district court was instructed to "consider the highest and best use of the tracts as industrial plant sites and [to] base an award of compensation for both permanent and temporary easements upon the evidence of comparable sales submitted by the Government"; to use the before-and-after method of valuation; and above all, to "rely on the evidentiary record as it presently exists." *Id.* The mandate of the Court issued on September 9, 1982.

On remand the landowners sought to introduce additional evidence. The Government objected that this contravened the Court of Appeals' express direction that the award be based on the existing evidentiary record. The

district court allowed the testimony, stating that "I do not believe that the court of appeals has a right to dictate to the district court what evidence he shall hear. . . ." In addition, the district court, *sua sponte*, ordered that yet another hearing be set. It was at this point that the Government determined to seek a writ of mandamus from this Court on grounds that the district court was expressly disobeying its mandate. The landowners maintained that neither they nor the district court was planning to go beyond the existing evidentiary record at the upcoming hearing.

Upon consideration of the application for writ of mandamus [2] this Court stated:

> Upon remand to the district court the instruction of this Court was that the determination of fair market value was to be made in reliance "Upon the evidentiary record as is presently exists."
>
> This Court's mandate directed that the record was to be considered closed, and judgment was to be entered in accordance with the government's theory of valuation on the government's evidence of comparable sales for industrial plant sites. *It is of course the responsibility of the district court to follow the mandate of this Court without deviation* * * *, *and we are confident that the able and experienced district judge will do so.*

(emphasis added).

Despite the caution and deference of this Court in denying the application for writ of mandamus, the district court appears to have avoided compliance with this Court's directive. Hence this Court [3] must once again consider this same case; and once again reverse the district court's judgment.

This Court originally remanded the case so that the district court could determine an award based on the

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[2] By a different and second panel of this Court.

[3] By a different and third panel of this Court.

before-and-after method of valuation, viewing the tracts as industrial sites and using the comparable sales introduced by the Government's witnesses. However, there is no longer any dispute as to what the before-and-after value should be, at least when the properties are considered as industrial sites and improper severance damages are eliminated. This is so, because the landowners have conceded, in their memorandum in support of motion for awards of just compensation and entry of judgment, that the before taking value of the tracts, assuming a highest and best use as industrial cites, was $3500 per acre, and the after taking value of the area subject to the easements was $350 per acre. Moreover, the landowners conceded that compensation for the temporary work easement should be calculated by awarding 32% of the value of the affected acreage, taken at a value of $3500 per acre. Finally, they conceded the correctness of the Government's calculation of the number of acres involved. Hence, we remand the case, once again, to the district court with instructions to render judgment in favor of the landowners on the basis of the following computations:

GOVERNMENT'S COMPUTATION OF JUST COMPENSATION

ITEM NUMBER	KWW Tracts 313E-1 & E-2	Firestone Tracts 314E-3 & E-4	Firestone Tracts 338E-1 & E-2
Before-taking value	$612,500	$1,190,000	$882,000
After-taking value	$595,805	$1,180,568	$869,873
Before Value less After Value	$ 16,695	$ 10,500	$ 12,127
Just compensation due for temporary easement	$ 3,483	$ 2,195	$ 3,114
Severance Damages to 2 acre piece of Firestone property			$ 3,500
TOTAL	$ 20,178	$ 12,695	$ 18,741
Total Compensation	$ 20,178	$31,436	
Amount of deposit	$ 30,888	$18,964	
Compensation less deposit	($ 10,710)	$12,472	

According to this computation, the Government should pay Firestone $12,472.00 plus interest from the date of taking, for the amount by which total compensation exceeds the amount of deposit. Likewise, KWW Associates should reimburse the Government $10,710.00, since the amount of deposit for KWW was that much larger than total compensation. However, KWW should pay interest only from the date of final judgment. *See, United States v. 3,317.39 Acres (Jefferson County)*, 481 F.2d 417, 420 (8th Cir. 1973) (Government may only collect interest from date of final judgment). Finally, we direct that each party to this proceeding shall bear its own attorney's fees.

REVERSED AND REMANDED.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 83-2427

USDC Nos. B-78-170-CA-MF-1547-3,
B-78-176-CA-1547-3, B-78-169-1547-3

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and the FIRESTONE TIRE AND RUBBER COMPANY, *et al.*,
Defendants-Appellees.

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, and KWW ASSOCIATES, *et al.*,
Defendants-Appellees.

[Filed May 14, 1984]

Appeal from the United States District Court
for the Eastern District of Texas

Before GEE, RANDALL and JOHNSON, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby remanded with instructions to the said District Court in accordance with the opinion of this Court;

IT IS FURTHER ORDERED that each party shall bear its own attorney's fees.

A TRUE COPY I CERTIFY
MURRAY L. HARRIS
Clerk
U.S. District Court
Eastern District, Texas

By: /s/ [Illegible]

May 14, 1984

Issued as Mandate: Jul. 18, 1984

APPENDIX J

UNITED STATES DISTRICT COURT
E.D. TEXAS, BEAUMONT DIVISION

Civ. A. Nos. B-78-169-CA-1547-3,
B-78-170-CA-1547-3 and
B-78-176-CA-1547-3

UNITED STATES OF AMERICA

v.

8.41 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, KWW ASSOCIATES, *et al.*

UNITED STATES OF AMERICA

v.

5.00 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, the FIRESTONE TIRE & RUBBER CO., *et al.*

UNITED STATES OF AMERICA

v.

6.90 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, the FIRESTONE TIRE & RUBBER CO., *et al.*

July 20, 1984

FINAL JUDGMENT

JOE J. FISHER, District Judge.

This case returns once again to the district court on remand from the Court of Appeals for the Fifth Circuit,

this time "with instructions to render judgment in favor of the landowners on the basis of the [Government's] computations . . .". *United States v. 5.00 Acres of Land, More or Less*, 731 F.2d 1207, 1209 (5th Cir. 1984).

In its previous order of remand, the Court of Appeals directed the district court

> to rely upon the evidentiary record as it presently exists. In calculating the fair market value, the district court shall consider the highest and best use of the tracts as industrial plant sites and shall base an award of compensation for both permanent and temporary easements upon the evidence of comparable sales submitted by the Government.

United States v. 8.41 Acres of Land, 680 F.2d 388, 395 (5th Cir. 1982.)

Denying the Government's subsequent petition for writ of mandamus, the Court of Appeals reiterated its mandate that "the record was to be considered closed, and judgment was to be entered in accordance with the Government's theory of valuation on the Government's evidence of comparable sales for industrial plant sites." *In Re United States of America*, No. 83-2080, slip op. (5th Cir. Feb. 22, 1983). The district court thereafter allowed the parties to present additional testimony and argument before entering judgment.

Understanding the "Government's theory of valuation" to mean the before-and-after method of valuation as applied in this Circuit, the district court thereafter used *only* the Government's evidence of comparable sales to compute "the difference in value of the entire tract before the taking and the value of the portion remaining after the taking." See *United States v. 8.41 Acres*, 680 F.2d at 392 n.5; *United States v. 158.24 Acres of Land, Etc.*, 515 F.2d 230, 233 (5th Cir. 1975); *Transwestern Pipeline Co. v. O'Brien*, 418 F.2d 15, 21 (5th Cir. 1969).

The Government defined the parent tracts: as to KWW, 175 acres; as to Firestone, 252 acres and 340 acres. Relying upon comparable sales of industrial plant sites, the Government's valuation expert put a value of $3500 per acre on each of the parent tracts. (Condemnation Commission Hearings Transcript, p. 329) The district court applied that value to the acreage of the three parent tracts to establish "before-taking" values. The Government witness testified to one sale of property comparable to that remaining after the taking, i.e., an industrial site burdened with an analogous easement. (Id., pp. 312-15). Such sale was the *only* evidence introduced by the Government of the market value of the land as burdened with the easement. That comparable tract sold for $3152 per acre. (Id., at 313). The court multiplied that value by the area of the tracts remaining after the takings to calculate "after-taking" values, and subtracted the results from the "before-taking" values determined by the Government witness. *United States v. 8.41 Acres of Land Situate in Orange County*, 576 F.Supp. 685, 691-92 E.D.Tex.1983).

Given the limited evidence available, the district court properly applied the before-and-after method of valuation. Moreover, the court based the award of compensation solely upon the evidence of comparable sales submitted by the Government. Despite the district court's undeviating adherence to its instructions and careful reliance upon only the Government's evidence, the Court of Appeals inexplicably concluded that the district judge awarded damages "unsupported by evidence other than that adduced in the additional evidentiary hearings." *United States v. 5.00 Acres*, 731 F.2d at 1208.

The district court's willingness to hear additional arguments and evidence apparently led the Court of Appeals to conclude that the district court not only *heard* additional evidence but *relied* upon it as well. The conclusion is erroneous and is manifestly unsupported by the record.

No useful evidence was adduced in the hearings and the court relied entirely upon the Government's evidence in the original record in executing its duty as finder of fact.

The Government approach to valuation, endorsed by the Court of Appeals, is inconsistent with both the law in this Circuit and the Constitutional requirement of just compensation. Leaving aside the more fundamental problem of just compensation—that the Government here pays but a small fraction of the price other buyers pay for the same property rights—the Government misused the before-and-after method in valuing the taking. Moreover, the mandated computation of the takings ignores the evidence the district court was directed to rely upon—comparable sales—and substitutes the feeling of an appraiser as to how much of "the bundle of rights" the landowners lost in the taken strips. (Condemnation Commission Hearings, Transcript pp. 323, 361)

The following computations accurately describe the Government approach to the before and after method:

ITEM NUMBER	KWW TRACTS 313E-18E-2	FIRESTONE 314E-38E-4	TRACTS 338E-18E-2
Value of Industrial Sites	$3500/acre	$3500/acre	$3500/acre
Area of Pipeline Corridor	× 5.3 acres	×3.05 acres	×3.85 acres
Value of Burdened acreage	$18,500	$10,675	$13,474
Diminution in value	× 90%	× 90%	× 90%
Just Compensation Due for permanent easement	$16,695	[9608] $10,500*	$12,127

The above computations detail the Government's experts' calculation of damages to the pipeline corridor acreage.

Value of Industrial Sites	$3500/acre	$3500/acre	$3500/acre
Area of parent tracts	× 175 acres	× 340 acres	× 252 acres
Before-taking value of parent tract	$612,500	$1,190,000	$882,000
Less Just Compensation due for permanent easement	— 16,695	— 10,500	— 12,127
"After-taking value" of parent tracts as burdened with permanent easement	$595,805	$1,180,568	$869,873

The second set of computations show how the "after-taking" values of the parent tracts were determined by the Government's expect. Opining that the perpetual permanent easement in no way affected the value of the remaining acreage, the expert "backed into" the conventional before and after formula and added temporary easement and severance damages.

Before-taking value of parent tracts	$612,500	$1,190,000	$882,000
After-taking value of parent tracts	— 595,805	— 1,180,568	— 869,873
Before value less after value	16,695	10,500	12,127
Just compensation due for temporary easement	3,483	2,195	3,114
Severance damages to 2 acre piece of Firestone property			3,500
TOTAL	20,178	12,695	18,741
Total compensation	20,178	31,436	
Amount of deposit	30,888	18,964	
	($10,710)	$12,472	

* This amount is from the Government's computations of damages, adopted by the Court of Appeals, but is the result of faulty arithmetic and failure to review the evidence of record. See Commission Transcript p. 361.

While the court, as finder of fact, did not find credible the expert's opinion of no damage to the remaining acreage—particularly in light of Government evidence to the contrary—and remains troubled by the Government's ability to take property rights for less than market value, the mandate is in one respect clear. The district court must comply "with [its] instructions to render judgment in favor of the landowners on the basis of the [Government's Computation of Just Compensation]" as shown above. *United States v. 5.00 Acres*, 731 F.2d at 1209. Accordingly, it is

ORDERED, ADJUDGED AND DECREED that: "the Government should pay Firestone $12,472.00 plus interest from the date of taking, for the amount by which total compensation exceeds the amount of deposit. Likewise, KWW Associates should reimburse the Government $10,710.00 since the amount of deposit for KWW was that much larger than total compensation. However, KWW should pay interest only from the date of [this] final judgment . . . [citations omitted] . . . Finally, we direct that each party to this proceeding shall bear its own attorney's fees." Id.

APPENDIX K

UNITED STATES DISTRICT COURT
E.D. TEXAS
BEAUMONT DIVISION

Civ. A. Nos. B-78-169-CA-1547-3,
B-78-170-CA-1547-3 and
B-78-176-CA-1547-3

UNITED STATES OF AMERICA

v.

8.41 ACRES OF LAND, SITUATE IN ORANGE COUNTY TEXAS, KWW ASSOCIATES, *et al.*

UNITED STATES OF AMERICA

v.

5.00 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, the FIRESTONE TIRE & RUBBER CO., *et al.*

UNITED STATES OF AMERICA

v.

6.90 ACRES OF LAND, SITUATE IN ORANGE COUNTY, TEXAS, the FIRESTONE TIRE & RUBBER CO., *et al.*

Oct. 4, 1984

ORDER

JOE J. FISHER, District Judge.

CAME ON TO BE HEARD the motion of the Defendants, FIRESTONE TIRE & RUBBER COMPANY and KWW ASSOCIATES, Motion for New Trial, in the above-styled and numbered causes, and the Court, having considered the Motion, set the matter for hearing, whereupon argument of the parties was heard.

The history of these troublesome condemnation cases appears in the reported opinions and need not be recited again. *See U.S. v. 5.00 Acres of Land, Etc.*, 507 F.Supp. 589 (E.D. Tex. 1980); 680 F.2d 388 (5th Cir. 1982); 576 F. Supp. 685 (E.D. Tex. 1983); 731 F.2d 1207 (5th Cir. 1984); 592 F. Supp. 829 (E.D. Tex. 1984). After the Court entered the latest final judgment, the landowners timely filed their Motion for New Trial.

The landowners assert they suffered a manifest injustice because the final judgment awards them only a small fraction of the compensation willing buyers in the free market pay for the same property rights.

The district court finds itself in a troubling position: respectfully deferential to the decisions of the Court of Appeals which specified the law of this case, yet convinced that errors committed by the trial court caused a manifest miscarriage of justice.

The initial, and perhaps farthest reaching, error of the trial court was its failure *ab initio* to remand the case to the condemnation commission for further findings as to both the highest and best use of the land and the after-taking value thereof. The landowners had offered extensive evidence of "comparable sales" of the *res* taken, i.e., pipeline easements. The commission erroneously found the highest and best use of the land to be as a "pipeline corridor," rather than as industrial plant sites. The commission's erroneous finding that the taken tracts

were "effectively severed" from the parent tracts led it and the trial court to further err "in rejecting the 'before-and-after' method of valuation of the larger tract." *U.S. v. 8.41 Acres*, 680 F.2d at 394.

The district court had instructed the commissioners to the effect that: "The best evidence of market value is comparable sales—i.e., sales from a willing seller to a willing buyer of similar property in the vicinity of the taking at or about the same time as the taking." *Id.*, 680 F.2d at 395, *citing United States v. Trout*, 386 F.2d 216, 222-23 (5th Cir. 1967). The commission apparently based its award on the "comparable sales" of pipeline easements.

The commissioners can be excused for incorrectly believing that recent sales of nearby pipeline easements were "comparable sales" which were the best evidence of market value of the property rights condemned. The government did, after all, condemn a pipeline easement. The crucial error, however, was the unjustified finding that the taken tracts were severed. If nothing else, the common sensical, albeit naive, approach of the commissioners points up a problem with the merchanistic application of the before-and-after method of valuation in such situations: that the government pays but a small fraction of the price private buyers pay for the same thing in the marketplace.

Notwithstanding that problem, the Court must properly apply the law to the facts in reaching a determination of just compensation. And that the Court failed to do, resulting in a manifestly unfair result.

The initial mistake, explained above, was the district court's clearly erroneous finding of effective severance of the taken tracts from the parent tracts. Having made that error, the Court neglected to make a finding that the parent tracts had lower values afer the taking. The record, however, was replete with evidence to that effect,

and the trial court further erred in not considering that evidence.

The Court of Appeals, in reviewing the initial judgment of the trial court, concluded that "[t]he landowners had an opportunity to prove the market value of the tracts was higher than established by the Government, but failed to meet this burden," *U.S. v. 8.41 Acres*, 680 F.2d at 395. Of course, the landowners had conceded the *before* taking value of the *parent* tracts and the *after* taking value of the *easement* area. *U.S. v. 5.0 Acres*, 731 F.2d at 1209. The crucial and still contested fact issue, however, was the *after* taking value of the easement burdened *parent* tracts, of which the easements' value was but a small part. Unlike the Government, the landowners failed to offer comparable sales of easement burdened tracts to prove a lower after-taking value of the parent tracts. Instead, they offered comparable pipeline easement sales.

The Court of Appeals rejected the landowners' evidence and considered only the Government's comparable sales on appeal. Apparently, the Court of Appeals was unaware that the principal sale of the landowners' was not subject to the *Slattery* exclusion rule which excludes evidence of sales negotiated by one having power to condemn. See *Transwestern Pipeline co. v. O'Brien*, 418 F.2d 15, 17-19 (5th Cir. 1969), quoting *Slattery Co., Inc. v. United States*, 231 F.2d 37 (5th Cir. 1956). On remand the trial court erroneously compounded the unintentional oversight of the Court of Appeals by ignoring both the admissible sales of the landowners and their expert witnesses' opinion testimony.

Aware that in *Transwestern*, the Court of Appeals "explicitly upheld the appropriateness of the [before-and-after] method for valuing pipeline easements," 418 F.2d at 21, the district court reexamined the record and applied "the proper measure of damages." *8.41 Acres*, 680 F.2d at 392. Concerned lest it violate the clear mandate

of the Court of Appeals, the district court exclusively relied upon the government's only credible evidence of the market value of the land as burdened with the easements. That evidence consisted of a single comparable sale of an easement-burdened plant site. On appeal, the Court of Appeals reversed the judgment and held the damage award "unsupported by evidence [in the record]." *U.S. v. 5.00 Acres*, 731 F.2d at 1208.

The apparent rejection of the trial court's factual finding as clearly erroneous—a finding predicated upon the government's sole comparable sale probative of after-taking value—made the further error of the trial court suddenly significant. That error, committed due to this court's misapprehension that it was compelled by the mandate, was the utter failure to consider the admissible, credible evidence originally offered by the landowners simply because it was presented under the wrong valuation theory. That omission violated the crystal clear rule in this circuit that, although comparable sales are often the most reliable form of evidence in determining market value, "other forms of evidence are also admissible on that issue," even though not based on an accepted method of valuation. *United States v. 329.73 Acres, Etc.*, 666 F.2d 281, 283 (5th Cir. 1982); *citing United States v. Toronto, Hamilton and Buffalo Navigation Co.*, 383 U.S. 396, 70 S.Ct. 217, 94 L.Ed. 195 (1949); *United States v. Smith*, 355 F.2d 807 (5th Cir. 1966). Although the pipeline easement sales testified to by the landowners do not directly establish the value of either the parent tracts or the easement strips, that evidence overwhelmingly indicates a reduction in the parent tracts' after-taking value due to the easement burden.

The landowners offered sales of single pipeline easements, including sales to buyers lacking condemnation power. As is the custom in the industry, the sales were negotiated on the basis of a certain number of dollars per rod. Of course, "the price per rod is not a useful

figure in determining fair market value of the easement area because sales based on a per-rod basis include the value and damages to the strip of land *plus damages to the remainder of the tract.*" *Transwestern*, 418 F.2d at 18 (emphasis added).

The per-rod prices of the admissible "comparable sales," i.e., those negotiated absent the power of condemnation, significantly exceed the undisputed values of and damages to the actual easement strips. Clearly, the sales do not establish fair market value of the easement area under the before-the-after method of valuation. *U.S. v. 8.41 Acres*, 680 F.2d at 395. But even though offered under an "unorthodox theory," the evidence has considerable probative value under the correct theory. And the magnitude of those marketplace values shows "damages to the remainder of the tract." *Transwestern*, 418 F.2d at 18. Moreover, the testimony of the landowners' expert witnesses was that such damage was substantial.

Of course, the per-rod prices reflect the damage of a *single* pipeline. The government easement, however, perpetually allows installation of *unlimited* lines, entailing repeated loss of access to the tracts, a fact suggesting greater damage to the remainder of the tracts. *See Transwestern*, 418 F.2d at 20. Indeed, it was in part for that reason the trial court explicitly rejected as implausible the unsupported opinion of the government valuation witness: that the after-taking values of the remainders were not affected by the easements. *U.S. v. 8.41 Acres*, 576 F. Supp. at 689.

In sum, the protraction of this litigation reflects a series of errors committed by the trial court. The original judgment was flawed by the erroneous characterization of the easement strips as separate parcels. *U.S. v. 8.41 Acres*, 680 F.2d at 394. On remand, the district court erred in ultimately basing its second judgment on

the government's evidence of a single comparable sale. *U.S. v. 5 Acres*, 731 F.2d at 1208. The trial court further erred in not considering the admissible evidence of pipeline sales offered by the landowners. And the third and final judgment of the district court is in all important respects supported exclusively by testimony rejected by the trial court as implausible.

The court is mindful of the longstanding precedent in this Circuit that "a motion for new trial is addressed to the trial judge's discretion. He may grant a new trial if he thinks he has committed error . . ." *Telfair v. Zim Israel Navigation Co.*, 428 F.2d 127, 128 (5th Cir. 1970); *quoting Marsh v. Illinois Central Railroad Co.*, 175 F.2d 498, 500 (5th Cir. 1949). In addition, Rule 59 empowers the trial judge to grant a new trial in order to prevent a miscarriage of justice. *Delta Engineering Corp. v. Scott*, 322 F.2d 11, 15-16 (5th Cir. 1963). The trial judge feels compelled to grant such relief. "It is his right, and indeed his duty, to order a new trial if he deems it in the interest of justice to do so." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, sec. 2803 (1973).

Admittedly, the landowners presented their case under a novel theory of law and failed. The trial court rejected the landowners' unorthodox theory despite their persuasive argument that it more realistically reflects the free marketplace and, therefore, more accurately reveals the value reasonable businessmen place upon pipeline easements. Because the trial court rejected the landowners' method of valuation, the judge ignored all their evidence, as well. Their reliance on a flexible approach to valuation was not without justification, however, as at least two other circuits permit an expert to reach his opinion of an award "in a way that any man of intelligence would have arrived at a valuation for ordinary business purposes." *United States v. 77,819.10 Acres, Etc.*, 647 F.2d 104, 108 (10th Cir. 1981); *quoting*

United States v. 97.19 Acres, Etc., 582 F.2d 878, 883 (4th Cir. 1978). Even in the Fifth Circuit, "market value is not an absolute standard, nor an exclusive method of valuation." *United States v. 329.73 Acres, Etc.*, 666 F.2d at 283; *citing United States v. Virginia Electric and Power Co.*, 365 U.S. 624, 633, 81 S.Ct. 784, 790, 5 L.Ed.2d 838 (1961). "Perhaps no warning has been more repeated than that the determination of value cannct be reduced to an inexorable rule." *United States v. 329.73 Acres, Etc.*, 666 F.2d at 283; *quoting United States v. Toronto, Hamilton and Buffalo Navigation Co.*, 388 U.S. 396, 402, 70 S.Ct. 217, 221, 94 L.Ed. 195 (1949). In rigidly applying the before and after method, the trial court did not heed that warning.

Fundamental fairness requires that the trial court not allow the infliction of a gross miscarriage of justice upon the litigants. In view of the harsh result imposed upon the landowners, and considering the relatively small inconvenience of further proceedings, it is, therefore

ORDERED, ADJUDGED AND DECREED that in the interest of justice the Motion for New Trial should be and is hereby GRANTED, and it is further ORDERED that a new trial be held before the original condemnation commission with the suggestion that the parties stipulate to such facts as are no longer in dispute.

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2758

IN RE: UNITED STATES OF AMERICA,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas

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(March 27, 1985)

Before WILLIAMS, JOLLY, and HILL, Circuit Judges.

BY THE COURT: *

Before us again is the condemnation action involving condemnees Firestone Tire and Rubber Company and KWW Associates. The background giving rise to this action, which we do not repeat here, is set forth in the first appeal of this case at *United States v. 8.41 Acres of Land, etc.*, 680 F.2d 388 (5th Cir. 1982), in which a panel of this court reversed the district court's judgment

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* Local Rule 4.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

and remanded with directions to render judgment on the then existing evidentiary record. *Id.* at 395. On remand, however, the district court granted a new hearing and, after another panel of this court denied mandamus sought by the Government to prevent the hearing, a new judgment was entered. *United States v. 8.41 Acres of Land, etc.*, 576 F. Supp. 685 (E.D. Tex. 1983). A third panel of this court reversed and remanded with explicit instructions to the district court as to the exact judgment to be entered. *See United States v. 8.41 Acres of Land, etc.*, 731 F.2d 1207, 1209 (5th Cir. 1984). The district court complied, though not without protest, entering a judgment on July 20, 1984, identical to that which we had ordered. However, subsequently, the district court granted a motion for new trial filed by the condemnees.

I.

Before us now is the Government's second Petition for Writ of Mandamus, pursued in order to prevent accomplishment of the district court's order granting a new trial. *See* 28 U.S.C. § 1651. We are of the opinion that the order granting a new trial contravenes the previous mandate of this court, *see* 731 F.2d at 1209; therefore, we feel compelled to grant the petition.

While mandamus is a remedy of somewhat drastic proportions, and is reserved for extraordinary situations, *Allied Chemical Corp. v. Daiflon*, 449 U.S. 33, 39 (1980), issuance of the writ is appropriate when "necessary to confine a lower court to the terms of an appellate [court's] mandate." *Will v. United States*, 389 U.S. 90, 95 (1967) (citing *United States v. United States District Court*, 334 U.S. 258, 264-65 (1948)); *see also Vendo Co. v. Lektro-Vend Corp.*, 434 U.S. 425, 427 (1978); *United States v. Haley*, 371 U.S. 18, 20 (1962); *American Trucking Association v. ICC*, 669 F.2d 957, 961 (5th Cir. 1982), *cert. denied*, 460 U.S. 1022 (1983); *City of Cleveland v. FPC*, 561 F.2d 344, 346-47 (D.C. Cir. 1977);

United States v. Ritter, 273 F.2d 30, 32 (10th Cir. 1959), *cert. denied*, 362 U.S. 950 (1960). The writ is especially appropriate when the petitioner has no adequate alternative remedy. *Allied Chemical*, 449 U.S. at 35.

As a panel of this court, we are bound by the decisions of other panels in this case. *Chapman v. National Aeronautics & Space Administration*, 736 F.2d 238, 241 (5th Cir.), *cert. denied*, —— U.S. ——, 83 L.Ed.2d 406 (1984). It appears that a new trial would serve no purpose other than that of circumventing the mandate issued by a prior panel of this court. While mandamus is rarely employed to reverse the grant of a new trial, *Allied Chemical*, 449 U.S. at 36, it is not completely proscribed. *See, e.g., Central Microfilm Service v. Basic/Four Corp.*, 688 F.2d 1206, 1212-13 (8th Cir. 1982), *cert. denied*, 459 U.S. 1204 (1983). We think it particularly appropriate where the new trial would have the effect of circumventing a prior mandate and where it would subject the Government to the unnecessary expense of a new trial before it can challenge the order granting the new trial on appeal. *Cf. Allied Chemical*, 449 U.S. at 35-36. Thus, we think the Government's right to have the motion for new trial denied is "clear and indisputable." *See id.* at 36; *Will v. Calvert Fire Ins. Co.*, 437 U.S. 655, 665-66 n.8 (1978). For these reasons the petition for mandamus is granted and the district court is directed to vacate its order granting a new trial and to enter judgment in accordance with the prior mandate of this court, *see* 731 F.2d at 1209, and with its own prior judgment entered July 20, 1984.

II.

The Government seeks to recover from counsel for condemnees an award for the attorney's fees it has incurred in relation to the motion for new trial filed by the condemnees. While the courts have inherent power to tax attorney's fees against counsel who "willfully abuse judicial processes," such sanctions "should not be assessed

lightly or without fair notice and an opportunity for a hearing on the record." *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980). Unable to hold such a hearing, we decline to rule on the Government's claim. However, should the Government wish to pursue its claim and seek a hearing before the district court, the Government's claim should be transferred by the district court to another district court in the Eastern District of Texas.

The Petition for Writ of Mandamus is GRANTED.

APPENDIX M

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil No. B-78-169-CA-1547-3,
Tracts No. 313E-1 and 313E-2

UNITED STATES OF AMERICA

vs.

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND KWW ASSOCIATES, *et al.*, and UNKNOWN OWNERS

Civil No. B-78-170-CA-1547-3,
Tracts No. 314E-3 and 314e-4

UNITED STATES OF AMERICA

vs.

5.00 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER CO., *et al.*, and UNKNOWN OWNERS

Civil No. B-78-176-CA-1547-3,
Tracts No. 338E-1 and 338E-2

UNITED STATES OF AMERICA

vs.

6.90 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, AND THE FIRESTONE TIRE AND RUBBER CO., *et al.*, and UNKNOWN OWNERS

[Filed May 20, 1985]

ORDER VACATING THIS COURT'S ORDER OF OCTOBER 4, 1984 GRANTING A NEW TRIAL IN THE CAUSES ENTITLED *UNITED STATES V. 5.00 ACRES OF LAND (ORANGE COUNTY, TEXAS), ETC.*, CIVIL NOS. B-78-170-CA-1547-3, ET AL., AND ENTERING JUDGMENT IN ACCORDANCE WITH THE PRIOR MANDATE OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT (*see* 731 F.2d at 1209) AND WITH THIS COURT'S OWN PRIOR JUDGMENT ENTERED JULY 20, 1984

As it has been commanded to do by the United States Court of Appeals for the Fifth Circuit in a Writ of Mandamus issued on April 16, 1985, this Court here now vacates its order of October 4, 1984 granting a new trial in the causes entitled *United States v. 5.00 Acres of Land (Orange County, Texas), Etc.*, Civil Nos. B-78-170-CA-1547-3, Et Al., and enters the following final judgment in accordance with the prior mandate of the United States Court of Appeals for the Fifth Circuit (*see* 731 F.2d at 1209), and its own prior judgment entered July 20, 1984:

FINAL JUDGMENT

The following computations accurately describe the Government approach to the before and after method, and this Court is mandated to render judgment in accordance with them:

Government's Computation of Just Compensation

ITEM NUMBER	KWW Tracts 313E-1 & E-2	Firestone Tracts 314E-3 & E-4	Firestone Tracts 338E-1 & E-2
Before-taking value	$612,500	$1,190,000	$882,000
After-taking value	$595,805	$1,180,568	$869,873
Before Value less After Value	$ 16,695	$ 10,500	$ 12,127
Just compensation due for temporary easement	$ 8,483	$ 2,195	$ 3,114
Severance Damages to 2 acre piece of Firestone property			$ 3,500
TOTAL	$ 20,178	$ 12,695	$ 18,741
Total Compensation	$ 20,178	$31,436	
Amount of deposit	$ 30,888	$18,964	
Compensation less deposit	($ 10,710)	$12,472	

Accordingly, it is ORDERED, ADJUDGED AND DECREED that the Government shall pay Firestone $12,472.00 plus interest from the date of taking, for the amount by which total compensation exceeds the amount of deposit; that KWW Associates shall reimburse the Government $10,710.00, since the amount of deposit for KWW was that much larger than total compensation; that KWW shall pay interest only from the date of (this) final judgment; and that each party to this proceeding shall bear its own attorney's fees.

SIGNED AND ENTERED this 20th day of May, A.D. 1985.

/s/ Joe J. Fisher
JOE J. FISHER
United States District Judge

APPENDIX N

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-2536
Summary Calendar

D.C. Docket No. CA-B-78-169-1547-3 c/w
78-170-1547 and 78-176-1547

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

8.41 ACRES OF LAND, ETC., *et al.*,
Defendants,

KWW ASSOCIATES, *et al.*, and
THE FIRESTONE TIRE AND RUBBER CO.,
Defendants-Appellants.

[Filed Apr. 4, 1986]

Appeal from the United States District Court for the
Eastern District of Texas

Before RUBIN, JOHNSON, and JONES, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court and the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendants-appellants pay to plaintiff-appellee the costs on appeal, to be taxed by the Clerk of this Court.

March 3, 1986

Issued as Mandate: Mar. 25, 1986

Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1966

In the Supreme Court of the United States

OCTOBER TERM, 1986

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the petition is untimely because all issues in this case were finally resolved by a 1984 decision of the court of appeals.

2. If not, whether the court of appeals' test for valuing pipeline easements, which takes into account the value of the parent tracts before and after a taking by the government, is improper.

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In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 85-1966

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 783 F.2d 1256; previous opinions of the court of appeals in this case are reported at 680 F.2d 388 (Pet. App. 47a-59a) and 731 F.2d 1207 (Pet. App. 79a-84a). Relevant opinions of the district court are reported at 507 F. Supp. 589 (Pet. App. 25a-41a), 576 F. Supp. 685 (Pet. App. 63a-78a), and 595 F. Supp. 731 (Pet. App. 93a-100a).

JURISDICTION

The court of appeals issued its opinion on March 3, 1986 (Pet. App. 1a-8a). The petition for a writ of certiorari was filed on May 30, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). As noted below, however (pages 6-8, *infra*) a prior judgment of the court of appeals, which was entered on May 14, 1984, finally resolved all

disputed issues and directed the entry of a specific judgment in this case. This petition accordingly is untimely.

STATEMENT

This case arose in March 1978, when the United States sought to condemn pipeline easements across three adjacent parcels of land in Orange County, Texas. One tract of approximately 700 acres is owned by petitioner KWW Associates (KWW) (Pet. App. 49a). The other two tracts are owned by petitioner Firestone Tire & Rubber Co. (Firestone), and together contain some 1,100 acres (*ibid.*). All three tracts are bisected by an existing road and row of pipelines, often described as a "pipeline corridor." The easements at issue here, which are 50 feet in width, adjoin the north side of this pipeline corridor. Shortly after the filing of a declaration of taking, the Department of Energy placed a single 42-inch pipeline within the acquired easements to serve the Strategic Petroleum Reserve. *Ibid.*

The District Court for the Eastern District of Texas appointed a three-person Condemnation Commission to make findings on just compensation. Initially, the district court instructed the Commission to make this determination by calculating the fair market value of the tracts immediately before the taking and then subtracting the value of what remained of the tracts immediately after the taking (the so-called " 'before-and-after' " method) (Pet. App. 49a n.1). The government's valuation witness followed this approach (*id.* at 50a). After opining that the highest and best use of the tracts was for industrial plant sites, he concluded, based on prices obtained in several recent sales of similar tracts, that application of the before-and-after test should result in an award of $16,695 for KWW and $21,700 for Firestone (*ibid.*).

Petitioners' expert witnesses, however, forsook the before-and-after method for a theory of easement valuation that considered the 50-foot strips of condemned land as

" 'severed' "—and therefore separately valued—from the parent tracts. These witnesses estimated that the KWW easement was worth $85,000 and the Firestone easements $132,751 (Pet. App. 51a). The Commission agreed that the easements had been "severed" from the rest of the property, and awarded compensation in the amounts testified to by petitioners' witnesses (*id.* at 18a, 23a). The district court affirmed the commission's findings, notwithstanding its earlier instruction regarding the use of the before-and-after method (*id.* at 25a-41a).

The court of appeals reversed (Pet. App. 47a-59a) ("*Orange County I*"). The court held the finding that the easement strips had been severed from the parent tracts to be clearly erroneous (*id.* at 57a). It noted that "[i]n each instance * * * the condemned strip of land had an integrated use with the parent tract—namely, pastureland," and that the strip did not lie between existing pipelines "but rather at the edge of a large field adjacent to existing pipeline easements" (*id.* at 55a-56a). In these circumstances, the court explained, "the proper measure of damages is * * * the before-and-after method of valuation, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement" (*id.* at 52a-53a), adding that the property should be valued "as a whole rather than [as] the sum of the various uses to which it has been placed" (*id.* at 58a). The court also noted that petitioners already had been given an opportunity to prove that the compensation offered by the government was inadequate, but that they had failed to produce proper valuation evidence. The court of appeals therefore remanded the case to the district court for a determination of fair compensation based upon the evidence of comparable sales already introduced by the government; the court of appeals expressly directed the district court to rely upon the existing record and to refrain from holding additional evidentiary hearings. *Id.* at 59a.

Upon remand, however, the district court proceeded to hear additional valuation evidence (Pet. App. 80a). The United States promptly sought a writ of mandamus to require the district court to decide the case on the existing record, as directed by the court of appeals. While the request for mandamus was denied, the court of appeals made clear its expectation that judgment would be entered in accordance with the government's theory of valuation and on the basis of the government's evidence of comparable sales (*id.* at 62a).

Notwithstanding this expectation, the district court permitted petitioners to offer additional evidence. At a hearing on February 24, 1983, petitioners' valuation witness testified that the taking of the easements had caused substantial severance damages to the remainder of the parent tracts by blocking access to the property. The district court accepted this severance damage theory (Pet. App. 72a-73a), finding that the tracts in their entirety were damaged by the taking in the amount of $465 per acre. This resulted in an award of $275,280 for Firestone and $81,375 for KWW (*id.* at 76a-77a).

On the government's appeal, the court of appeals again reversed (Pet. App. 79a-84a) ("*Orange County II*"), explaining that the district court's action was inconsistent with the mandate of *Orange County I*. The court of appeals also found that it was able to itself determine just compensation for the taking, noting that petitioners had conceded the validity of the government's before-and-after figures, at least when the properties were viewed as industrial sites and improper severance damages were eliminated (*id.* at 83a). The court of appeals therefore remanded the case, directing the district court to enter judgment in specified amounts (*id.* at 83a-84a).

The district court at first complied with this new mandate by entering judgment as directed in *Orange County II* (Pet. App. 87a, 92a). Soon afterwards, however, the court granted petitioners' motion for a new trial (*id.* at 93a, 100a). The government again petitioned the court of appeals for a writ of mandamus, this time successfully (*id.* at 101a). In granting the writ, the court of appeals observed that "a new trial would serve no purpose other than that of circumventing the mandate issued by a prior panel of this court" (*id.* at 103a). The district court therefore was directed to enter judgment in accordance with the court of appeals' mandate in *Orange County II* (*ibid.*).

The district court complied with the writ, vacating its order for a new trial and entering judgment in the amounts specified in *Orange County II* (Pet. App. 105a-107a). Petitioners then appealed, and the court of appeals affirmed (*id.* at 1a-8a). The court noted that the "the issues presented to this panel were addressed and resolved in the two prior appeals in this case," and that "[b]ecause [petitioners] now appeal from a judgment of the district court which was entered in strict accordance with the second opinion of this Court, there is nothing presented for review in this case" (*id.* at 5a). The court accordingly held that "[t]he doctrine of the law of the case forecloses a different result [from] that which was obtained in the earlier two appeals" (*id.* at 5a-6a).

ARGUMENT

The decision of the court of appeals in this case is correct, does not conflict with any decision of this Court or any other court of appeals, and does not present any issue warranting this Court's review. Petitioners' challenges, moreover, are time-barred, because they failed to seek certiorari from the court of appeals' 1984 decision in *Orange County II*, which finally resolved all issues in this case.

1. The petitioners here seek review of rulings made in *Orange County I* regarding the proper method of determining just compensation. Petitioners were not required to seek a writ of certiorari within 90 days of that decision because the court of appeals there left open the amount of just compensation to be awarded. *Orange County II*, however, resolved this issue by setting out the precise amounts that petitioners were to receive (see Pet. App. 84a). The present challenge therefore should have been brought within 90 days of the judgment in *Orange County II*.

The principles controlling here are set out in *Federal Trade Commission* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-212 (1952) (footnotes omitted):

> the mere fact that a judgment previously entered has been reentered or revised in an immaterial way does not toll the time within which review must be sought. Only when the lower court changes matters of substance, or resolves a genuine ambiguity, in a judgment previously rendered should the period within which an appeal must be taken or a petition for certiorari filed begin to run anew. The test is a practical one. The question is whether the lower court, in its second order, has disturbed or revised legal rights and obligations which, by its prior judgment, had been plainly and properly settled with finality.

See also *Federal Power Commission* v. *Idaho Power Co.*, 344 U.S. 17, 20 (1952) ("[i]f the court did no more by the second judgment than to restate what it had decided by the first one * * * the 90 days would start to run from the first judgment"); *Department of Banking* v. *Pink*, 317 U.S. 264, 266-267 (1942). Cf. *FCC* v. *League of Women Voters*, 468 U.S. 364, 373 n.10 (1984) (" 'mere fact that a judgment previously entered is reentered or revised in an immaterial way does not toll the time within which review must be

sought' "). See generally R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 314-316 (6th ed. 1986).

Petitioners do not claim, nor could they, that the decision below changed matters of substance or resolved a genuine ambiguity in the judgment rendered in *Orange County II*. Indeed, the opinion below makes clear that the "issues presented to this panel were addressed and resolved in the two prior appeals in this case" (Pet. App. 5a). Nor do petitioners claim that the procedural posture of the case made a petition for certiorari inappropriate after the decision in *Orange County II*. The petition presents no question that was not fully ripe for this Court's consideration at that time.

The rule that a petition must be filed within 90 days of a judgment that finally resolves all relevant issues is rooted in "the principle that litigation must at some definite point be brought to an end" (*Minneapolis-Honeywell*, 344 U.S. at 213 (footnote omitted)). The importance of this principle is clearly illustrated by the facts of this case. The ruling in *Orange County II* should have brought to a close a case that already was on its third trip to the court of appeals—two of which patently should have been unnecessary.[1] The court of appeals' decision in *Orange County II* left no doubt that the case had been fully and finally resolved. No reason appears why petitioners could not then have sought certiorari. Instead, they attempted to circumvent the clear mandate of *Orange County II* by moving for a new trial. This course resulted in two additional trips to the court of appeals. The proceedings here therefore present a clear case for invoking the rule requiring the filing of a petition within 90 days of judgment.

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[1]As noted in *Orange County II*, the district judge expressed the view that the court of appeals has no right " 'to dictate to the district court what evidence he shall hear * * *' " (Pet. App. 82a). The court of appeals ultimately was forced to the "extraordinary [step]" (*id.* at 102a) of issuing a writ of mandamus to achieve compliance with its instructions.

2. Even if it were not time-barred, petitioners' claim would lack merit. Before the Commission, petitioners proceeded on the theory that the 50-foot strip affected by the easement should be analyzed as a "severed" parcel, with value based on the amount that private companies pay to buy pipeline easements. The court of appeals in *Orange County I* rejected this theory because the easement strips were integral parts of larger tracts. On remand, petitioners advanced a new theory—that the easements damaged the large parent tracts by threatening to cut off access to them should the government decide to lay additional pipelines (see Pet. App. 73a, 80a). That theory was rejected in *Orange County II*.

Petitioners do not now take issue with the rejection of their two earlier theories. Instead, they offer a third challenge to the government's valuation: they claim that the proper test involves a comparison of the pre-taking market value of the tracts, including the landowners' ability to sell pipeline easements, with the after-taking market value of the tracts, modified by the fact that "one of a finite number of possible sales of easements in the corridor has been made" to the government, which in turn may assign its rights (Pet. 13-14). Petitioners contend (*id.* at 14) that this method would yield a result that would "closely approximate" the prices paid for pipeline easements.

We note at the outset that this theory was not advanced until after the court of appeals had directed the entry of judgment in *Orange County II*. The court of appeals failed to consider this method of valuation in its opinion below, holding that *Orange County II* had finally resolved all of the issues in this case. Petitioners accordingly are precluded from presenting this theory to the Court.

In any event, petitioners' theory is fundamentally unsound. Their position evidently is that the existing row of pipelines made the next adjacent strip of land especially

valuable for sale as a pipeline easement, because pipeline builders prefer to follow existing "corridors." But even if that is the case, the government did not take this element of value. The purported special value in adjacency to a pipeline corridor was simply displaced 50 feet northward. Because the tracts involved here are very large (Pet. App. 49a), the landowners did not lose any significant ability to take advantage of the pipeline corridor. Indeed, shortly after the declaration of taking was filed in this case, the landowners sold two successive easements alongside the government's easement (I Tr. 160).

"It is the owner's loss, not the taker's gain which is the measure of the value of the property taken." *United States* v. *Causby*, 328 U.S. 256, 261 (1946), citing *United States* v. *Miller*, 317 U.S. 369 (1943). What was lost in this case was nothing more than the right to use the surface of the 50-foot strips in a way that would interfere with the government's right to repair its pipeline. The government's appraiser properly accounted for this loss by awarding 90% of the value of this strip, considered as industrial property.[2]

The cases cited by petitioners (Pet. 9-11) stand only for the proposition that the government must compensate a landowner for the loss of a particular element of value (such

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[2]Even in a case where the taking of an easement detracted from the owner's ability to take advantage of a pipeline corridor, the measure of this loss would not be the equivalent of the amount that pipeline companies pay for easements. The evidence in this case showed that pipeline companies regularly pay "hold-up" prices to landowners, due to the enormous expense of going around a particular parcel once a route is laid out (I Tr. 70-71, 334, 352-353, 358-359). The government is not required to pay just compensation on the basis of prices that are inflated by the landowners' ability to hold up a project. See, *e.g.*, *United States* v. *Chandler-Dunbar Co.*, 229 U.S. 53, 79-81 (1913); *McGovern* v. *New York*, 229 U.S. 363, 371-372 (1913). In any event, the parcels here were large, and there was no evidence that the taking of the government's easements would measurably diminish petitioners' ability to grant additional ones.

as a quarry) contained in a larger tract of land, where that element contributes to the overall value of the parcel. Those cases are simply irrelevant here, however, because petitioners did not lose whatever special value might inhere in having land next to a pipeline corridor. And far from articulating a conflicting standard, the court of appeals in *Orange County I* acknowledged that "[t]he district court must * * * value the property as a whole rather than the sum of the various uses to which it has been placed" (Pet. App. 58a).

3. Petitioners also suggest (Pet. 12 n.4) that the court in *Orange County I* denied them due process by foreclosing the introduction of new evidence on remand. As the court of appeals explained in its decision below, however, there was no unfairness in this. Because "it had long been established that the exclusive method in the Fifth Circuit for valuation of partial takings was the before-and-after methodology * * * [petitioners] should have plainly anticipated the requirement to put on evidence comporting with that theory." Having made a "tactical decision" to proceed solely under an " 'unorthodox' " theory, petitioners were not in a position to demand another opportunity to present evidence on valuation. Pet. App. 7a n.1. And as the court of appeals noted (*ibid.*), *duPont* v. *United States*, 385 F.2d 780, 784 (3d Cir. 1967), relied on by petitioners here (Pet. 12 n.4), is inapposite; the appellants in that case were given an opportunity to present additional evidence on remand because they could not have anticipated that their initial evidence would be ruled incompetent.[3] Due process does

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[3]Indeed, in this case the district court had specifically instructed the commission to use the " 'before-and-after' " method of valuation (Pet. App. 49a, n.1). In any event, when petitioners mistakenly were given an additional chance to introduce evidence after *Orange County I*, they proceeded under a severance damage theory that they have since abandoned.

not require that a litigant who voluntarily forgoes a reasonable opportunity to present evidence be given a second chance when his unorthodox theory is rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

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OCTOBER TERM, 1986

8.41 ACRES OF LAND, MORE OR LESS, SITUATE IN ORANGE COUNTY, STATE OF TEXAS, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

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OCTOBER TERM, 1986

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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REPLY BRIEF FOR PETITIONERS

Petitioners The Firestone Tire & Rubber Company and KWW Associates[1] reply to the opposition of the United States to the petition for a writ of certiorari to review the decision of the Court of Appeals for the Fifth Circuit in this case.

ARGUMENT

1. The Government contends that the petition is untimely because the second decision of the court of appeals, in 1984, resolved all the issues in this case and petitioners were bound to seek review of that decision or forgo

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[1] The listing required by Rule 28.1 is in the petition at p. i, n.1.

the opportunity to have the issues decided by this Court. In support of that claim, the Government cites several decisions of this Court holding or stating that the mere re-entry by a lower court of a previous judgment does not extend the time within which review by this Court may be sought. (Br. in Opp. 6.)

The rule of those cases is not pertinent to this case. This case entailed no mere re-entry of a prior judgment without intervening proceedings that went to the merits. Here the district court, true enough, did initially enter the judgment that the court of appeals directed it to enter by its 1984 decision. (Pet. 87a-92a.) But there was more. The district court entertained and granted a motion for a new trial. (Pet. 93a-100a.) The Government filed a petition for mandamus in the court of appeals to undo that action. The petition was contested. A panel of the court of appeals issued the writ, after concluding that the grant of a new trial was inconsistent with the court's mandate. (Pet. 101a-104a.) The district court complied with the writ by entering the judgment commanded of it. (Pet. 105a-107a.) The landowners took an appeal from that judgment. The appeal was given a new docket number different from the number assigned to either the first or the second previous appeals by the Government. The appeal was entertained by the court of appeals and decided by it, with an opinion, by a judgment affirming the judgment below. (Pet. 1a-8a, 108a-109a.)

The time within which to apply to this Court for review of that decision of the court of appeals did not begin to run until the decision was made. The decision was not the nullity that the Government would make of it. In form and in substance the decision and this petition to review it satisfy the pertinent statutory requirements. It was a decision in a case that was "in [a court] . . . of appeals," 28 U.S.C. § 1254, the decision was properly styled by the court its "judgment" (Pet. 109a), and

the petition for certiorari was filed "within ninety days after the entry of such judgment," 28 U.S.C. § 2101(c).

A petition for certiorari certainly could have been filed asking review of the 1984 court of appeals decision. Indeed, since the errors of law that the court has perpetuated in subsequent decisions were committed in the opinion accompanying its decision on the Government's first appeal, in 1982 (Pet. 47a-59a), a petition could have been filed asking for review of that decision. The fact that no petition was filed to review that first interlocutory decision (or, if it had been the fact, that such a petition was filed and denied) does not preclude consideration of a petition to review the court of appeals' final decision in the matter. And the decision rendered in 1985 was unquestionably a final decision subject to review in this Court.

Had nothing more happened on remand after the 1984 court of appeals decision than the entry of the prescribed judgment by the district court, and had an attempted appeal from that judgment been dismissed, as the court of appeals' own precedents indicate that it would have been,[2] then the timeliness issue proffered by the Government would have been posed. Quite possibly the rule of *FTC* v. *Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 211-12 (1952), would require the denial of a petition purportedly seeking review of the court of appeals' dismissal of such an attempted appeal. But more did happen in this case. The district court entertained and granted a motion for new trial and then withdrew the grant and entered a new judgment in obedience to a writ of mandamus. The court of appeals recognized the significance of these further proceedings by entertaining the

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[2] Davis v. United States, 244 F.2d 308 (5th Cir. 1957); Hoxsey Cancer Clinic v. United States, 212 F.2d 439 (5th Cir.), *cert. denied*, 348 U.S. 835 (1954); Amalgamated Ass'n of Street Elec. Ry. & Motor Coach Employees v. Southern Bus Lines, 201 F.2d 53 (5th Cir.), *cert. denied*, 345 U.S. 964 (1953).

landowners' appeal and deciding it, with a reasoned opinion, by affirming the district court's judgment. The court did not dismiss the appeal, as the Government urged it to do on the basis of the precedents cited in the margin above (Br. for United States, 5th Cir. No. 85-2536, p. 6).

It is not significant to the issue of timeliness that the court of appeals relied in major part on the doctrine of the "law of the case" in the opinion accompanying its judgment of affirmance. The law of the case can be established, and usually is, by a clearly interlocutory decision. Reliance on the doctrine by the court of appeals does not mean that its 1985 affirmance of the district court's final judgment was a mere restatement of its 1984 reversal of a previous district court judgment.[3]

In the cases cited by the Government to support its claim of untimeliness, unlike this case, no alteration of the substantive rights adjudicated in the prior orders was sought by the parties nor was any request for such an alteration entertained by the tribunal in question. In *Minneapolis-Honeywell*, the Court stated that a post-judgment memorandum filed by petitioners in a court of appeals did not extend the period for seeking review in this Court because "in no manner" did the memorandum seek amendment of the substantive rights adjudicated in the previous judgment. The Court indicated that, if the lower court had entertained a petition by which an amendment of matters of substance was sought, the period for seeking review by the Court *would* have been extended. 344 U.S. at 210-11. Similarly, in *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942), the Court clearly distinguished a request for certification of a federal question, which did not toll the running of the period

[3] In the court below, the Government argued the law of the case as an alternative to its argument for dismissal of the appeal, assuming for purposes of the alternative argument "that this appeal could be maintained." Br. for United States, 5th Cir. No. 85-2536, p. 6.)

for filing certiorari, from requests to alter the rights adjudicated by a prior order, which, if entertained, *would* suspend the running of the period for review.

Thus the cases cited by the Government actually confirm that petitioners' petition for certiorari, filed within 90 days of the court of appeals' third and final decision, was timely.

2. On the merits, the Government mistakenly states that, for all the usual reasons, the case does not present any issue warranting review by this Court. (Br. in Opp. 5.) To the contrary, the issue posed by the court of appeals' refusal to permit consideration of the element of value represented by the pipeline corridor crossing petitioners' lands is an important issue in eminent domain law. The resolution of the issue by the court below is inconsistent with decisions of this Court and conflicts with decisions of other courts of appeals.

a. The Government blandly states that the "government's valuation witness followed" the "before-and-after" method of valuation. (Br. in Opp. 2.) He did not. That he did not is clear from a simple comparison of the court of appeals' description of the before-and-after method, quoted by the Government (Br. in Opp. 3), and the description in the brief in opposition of the Government valuation witness' testimony. The point is important because the judgment dictated by the court of appeals rested solely on that witness' evidence.

The court of appeals said that, when an easement is taken, "the proper measure of damages is . . . the before-and-after method of valuation, expressed as the difference between the market value of the land free of the easement and the market value as burdened with the easement." (Pet. 52a-53a.) The Government's valuation witness made no effort to estimate any such before-and-after difference in value of petitioners' tracts free of and burdened by the pipeline easement. As the Government says,

its appraiser valued the landowners' loss for which they were to be compensated at 90 percent of the value of the very strip of land over which the easement was taken, "considered as industrial property." (Br. in Opp. 9.) That description of the testimony has the virtue of candor for it ignores the mathematical doodling in which the witness engaged to make it appear that he had made a true before-and-after valuation (Pet. 14). But it lays bare the fact that the court of appeals, nominally insisting on a before-and-after valuation of the parent tracts, in fact imposed a method of valuation that had regard narrowly to the small strip of land beneath which the new pipeline or pipelines would be laid and grossly undervalued the taking by turning a blind eye to the element of value imparted to the tracts as a whole by the existing pipeline corridor.

b. It may be because of its apparent misunderstanding of before-and-after valuation that the Government asserts that the district court's effort, after the first remand, to find a genuine before-and-after valuation in the Government's evidence on which it had been directed to rely constituted the acceptance of a "severance damage theory." (Br. in Opp. 4.) As the Government says, the district court found that "the tracts in their entirety were damaged by the taking in the amount of $465 per acre." (*Id.*) That finding was a pure before-and-after finding, based on two sales in the Government witness' study, one of a tract free of an easement and the other of a tract burdened with an easement. (Pet. 71a-72a.) The difference in sales value was $465 an acre.

The court found support for this difference in value indicated by the sales of comparable tracts in the particular circumstances of the tracts in issue. It found that the Government's pipeline easement, which carried the right to lay an unlimited number of pipelines, "is such a burden on the land as to sharply reduce the value of the parent tracts." (*Id.* at 73a.) That is exactly the

kind of reduction in value that the before-and-after method is supposed to measure. It reflects no "new theory" of severance damages (Br. in Opp. 8).

c. The error of the court of appeals lay not just in its mistaken belief that the method of valuation it prescribed was the approved before-and-after method but also, and principally, in its mechanical insistence that, because the highest and best use of the tracts considered as a whole was industrial, the element of value imparted to them by the additional compatible use indicated by the existence of the pipeline corridor could not be considered.

The substantiality of the value of the compatible use is demonstrated by the landowners' evidence of sales of pipeline easements in the vicinity—19 of them. Contrary to what the Government asserts (Br. in Opp. 9 n.2), these sales do indicate the value of what the landowners lost when the Government took the multi-pipeline, assignable easement over their tracts. If some of the sales were to companies that lacked the power of eminent domain, which might suggest a bargaining advantage for the seller, others, on which the landowners were happy to rely, were to companies that did have the condemnation power and therefore had a bargaining edge over the seller and no reason at all to pay the "hold-up" prices to which the Government refers.

Whether as a result of a genuine application of the before-and-after method or by simple, straightforward reference to the 19 comparable sales of pipeline rights-of-way in the vicinity, petitioners had to be compensated for the element of value represented by the attractiveness of their land to pipeline builders and the pre-emption by the Government of some of their opportunities to sell pipeline rights-of-way. The court of appeals' failure to recognize that element of value denied the petitioners the just compensation to which they are entitled under the Fifth Amendment.

CONCLUSION

For the reasons stated above and in the petition, certiorari should be granted.

Respectfully submitted,

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